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HAROLD B. WILLEY,

In the Supreme Court of the United States

OCTOBER TERM, 1954

NATIONAL BANK OF DETROIT,
a national banking association,
Appellant,

— vs. —

DEPARTMENT OF REVENUE OF
THE STATE OF MICHIGAN,
Appellee.

No. 623

STATEMENT AS TO JURISDICTION

On Appeal from the Supreme Court of Michigan

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In the Supreme Court of the United States

OCTOBER TERM, 1954

NATIONAL BANK OF DETROIT, a national banking association, Appellant,

— vs. —

DEPARTMENT OF REVENUE OF THE STATE OF MICHIGAN, Appellee.

No. _____

STATEMENT AS TO JURISDICTION

A. OPINIONS BELOW

This case was heard twice by the Supreme Court of Michigan, first on procedural grounds, and then on the merits. The opinions are reported as *National Bank of Detroit* v. *Michigan Department of Revenue*, 334 Mich. 132, 54 N.W. 2d 278; and *National Bank of Detroit* v. *Michigan Department of Revenue*, 340 Mich. 573, 66 N.W. 2d 237; and are attached as Appendices B and E.

The unreported opinions and the decree of the trial court are attached as Appendices A, C, and D.

For further reference there is included herewith as Appendix F the opinion of the Michigan Supreme Court

in the companion case of *Federal Reserve Bank of Chicago* v. *Department of Revenue*, 339 Mich. 587, 64 N.W. 2d 639.

B. GROUNDS OF JURISDICTION

(i) Nature of Proceeding Below

National Bank of Detroit brought this action for a declaration of rights under the Michigan Declaratory Judgment Act.[1]

The bank sought a determination that Michigan Department of Revenue is prevented by the Constitution of the United States and by the National Bank Act[2] from imposing the Michigan sales tax on the proceeds of retail sales to National Bank of Detroit, and that to the extent that the Michigan Sales Tax Act[3] purports to permit or require this imposition it is invalid.

The Michigan Supreme Court held that the tax is validly imposed and that the taxing statute does not violate either the United States Constitution or the National Bank Act.

(ii) Date of Judgment to be Reviewed

This appeal is brought to review the opinion and judgment of the Supreme Court of Michigan filed October 4, 1954, insofar as it affirms the portion of the Decree entered by the trial court on October 27, 1953, holding that the proceeds of retail sales to National Bank of Detroit are subject to Michigan sales tax.[4] Notice of Appeal was filed in the Supreme Court of Michigan on December 30, 1954.

(iii) Statutory Basis of Jurisdiction

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

(iv) Cases Sustaining Jurisdiction

The following cases are believed to sustain jurisdiction

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[1] Mich. Comp. Laws 1948, § 691.501, *et seq.*

[2] R.S.U.S. § 5133 *et seq.*; 12 U.S.C. § 21 *et seq.*

[3] Act 167, Michigan Public Acts of 1933, as amended, C. L. 1948 § 205.51 *et seq.*

[4] The opinion also holds that retail sales *by* National Bank of Detroit are not subject to sales tax. See Statement of Case, *infra*. That portion of the opinion is not involved in this appeal.

of this Court on appeal from the Supreme Court of Michigan:

Esso Standard Oil Co. v. *Evans*, 345 U.S. 495.
Kern-Limerick, Inc. v. *Scurlock*, 347 U.S. 110.
Railway Express Agency, Inc. v. *Virginia*, 347 U.S. 359.
Franklin National Bank v. *New York*, 347 U.S. 373.

(v) State and United States Statutes Involved

The Michigan Sales Tax Act (Act 167, Public Acts of Michigan of 1933, as amended, Compiled Laws of Michigan of 1948, § 205.51 *et seq.*), the validity of which is involved in this case, is set forth in its entirety in Appendix G.

Section 5219 of the Revised Statutes of the United States (12 U.S.C. § 548) is attached as Appendix H.

C. QUESTION PRESENTED BY APPEAL

Do the Constitution of the United States and/or Section 5219 of the Revised Statutes of the United States prevent the State of Michigan from imposing the Michigan sales tax upon the proceeds of retail sales of tangible personal property made by Michigan retailers to National Bank of Detroit?

D. CONCISE STATEMENT OF THE CASE

National Bank of Detroit is a national banking association having its principal office in Detroit and 43 branches throughout the metropolitan Detroit area. In addition to serving the commercial and savings banking requirements of its depositors, it functions in numerous ways as a fiscal agent for the federal government.

Michigan Department of Revenue is the agency charged with administration of the Michigan Sales Tax Act.

In the course of its operations the bank annually purchases from Michigan retail vendors large quantities of

such articles as furniture, office equipment, automobiles, stationery and supplies. The bank also makes retail sales to Michigan customers in disposition of repossessed merchandise and in the operation of a cafeteria for its employees.

Prior to July 1, 1949, the Michigan Sales Tax Act was construed to exempt from tax retail sales *to* National Bank of Detroit and other national banks, and no sales tax was collected from National Bank of Detroit by its Michigan suppliers. Sales *by* the bank were considered taxable. The bank held a retail sales tax license, collected the tax from its vendees, and remitted the tax so collected to Michigan Department of Revenue.

Act 272 of the Michigan Public Acts of 1949, effective July 1 of that year, purported to subject sales to national banks to the Michigan sales tax, and reasserted the taxability of sales by national banks. Since then, as a condition of retail sales to National Bank of Detroit, Michigan vendors have collected from the bank an additional sum equal to 3 per cent of the sale price, nearly always separately stated on the invoice and designated "Michigan Sales Tax."

National Bank of Detroit protested the addition of the tax to the price of the property it purchased, asserting its federal immunity from such taxation; but suppliers refused to sell to the bank without adding the Michigan sales tax to the price of property they sold. These suppliers asserted that Act 272 eliminated the exemption of sales to national banks and that they had been advised by Michigan Department of Revenue that after July 1, 1949, such sales were taxable.

Because of its need for the supplies so furnished and because its suppliers insisted on payment of the tax as a condition of sale, the bank was required to pay the tax in

order to continue in operation. National Bank of Detroit has therefore paid the sales tax with respect to substantially all of its purchases since July 1, 1949, asserting in each case its claim that the tax is illegally assessed.

In October, 1949, National Bank of Detroit, on behalf of itself and all other national banking associations in Michigan, numbering over 80, commenced this action by filing its Petition for Declaration of Rights. The petition asserted that to the extent that the Michigan Sales Tax Act purported to tax either purchases or sales by the bank, it was invalid as violative of the Constitution of the United States and the National Bank Act. (Record, pp. 9-11.)

The Department of Revenue appeared specially and moved to dismiss that portion of the petition dealing with taxation of purchases made by the bank. The principal ground of the motion was that the Michigan sales tax is levied on the retail vendor and not on the bank as a purchaser; and that, therefore, the bank's claim that taxation of the proceeds of such purchases violated its federal rights raised no controversy or justiciable question as between the Department of Revenue and National Bank of Detroit.

The trial court granted the motion of the Department of Revenue. National Bank of Detroit appealed to the Supreme Court of Michigan, which reversed the decision of the trial court and remanded the case for trial on the merits.

Following trial on the merits, the trial court filed an opinion, holding that despite the fact that the tax is uniformly collected from National Bank of Detroit by its suppliers as a condition of sale, the bank is not a taxpayer as respects its purchases because the legal incidence of the Michigan sales tax falls on the retail vendor. From this premise the court concluded that neither the National Bank Act nor the Constitution of the United States protected National Bank of Detroit from the application of Michigan

sales tax to its purchases. As a corollary, the court found that both the National Bank Act and the Constitution precluded the imposition of the tax on sales made by the bank in the operation of its cafeteria and in disposition of repossessed merchandise. A decree was entered in accordance with the opinion.

National Bank of Detroit again appealed to the Supreme Court of Michigan, which affirmed the decree of the trial court.

This appeal is taken from that portion of the final judgment of the Supreme Court of Michigan holding that the Michigan sales tax is validly imposed on the proceeds of sales by Michigan retail vendors to National Bank of Detroit.

E. THE FEDERAL QUESTION

(i) Jurisdiction

Jurisdiction of this matter is conferred by 28 U.S.C. § 1257 (2), which provides for review by appeal where the validity of a state statute is questioned on the ground of its repugnance to the Constitution and laws of the United States, and the decision of the state court is in favor of its validity.

In the instant case the Michigan Sales Tax Act was challenged as repugnant to the federal Constitution and the National Bank Act, and the decision of the highest court of Michigan was in favor of its validity.

In each of the cases cited on page 3 hereof as sustaining the jurisdiction of this Court on appeal, a state court had upheld the validity of a state taxing statute against the claim that the application of the state act to the appellant violated the Constitution and/or laws of the United States. In each, review was sought by appeal pursuant to 28 U.S.C. § 1257 (2). In each this Court took jurisdiction. It should

be noted that two of the cases cited involved assertion of immunity from a state tax because of its impact on an agency of the federal government.

(ii) Substantiality

National Bank of Detroit, as a federal instrumentality, claims immunity from the Michigan sales tax under the Constitution of the United States and the decision of this Court in *McCulloch* v. *Maryland,* 4 Wheat. 316, 4 L. Ed. 608. The constitutional immunity as such is not elaborated here. This discussion is confined to the immunity of national banks as defined in Sec. 5219 U.S.R.S., which statutory immunity was the principal concern of the court below.

The holding of the Michigan court conflicts with decisions of this Court in three respects: (1) It disregards the fact that the practical effect of the Michigan Sales Tax Act is to tax National Bank of Detroit. (2) It disregards the scope of the immunity afforded national banks by the National Bank Act. (3) It conflicts with two recent decisions of this Court involving closely similar facts. The questions thus presented merit plenary consideration by this Court for their resolution.

(1) *The opinion of the Supreme Court of Michigan disregards the fact that the practical effect of the Michigan Sales Tax Act is to tax National Bank of Detroit.*

This Court has consistently held that ". . . the question whether the tax deprives the taxpayer of a federal right . . . turns not on the characterization which the state has given the tax, but on its operation and effect." *Richfield Oil Corp.* v. *State Board,* 329 U.S. 64, 84.[1] The effect of

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[1] See also:

New Jersey Insurance Company v. *Division of Tax Appeals,* 338 U.S. 665, 673:

"It matters not whether the tax is, as appellee contends, an indirect or excise levy on net worth measured by corporate capital and surplus or is, as appellant urges, a tax on personal property based on a valuation gauged by capital and surplus. *Our inquiry is narrowed to whether in*

the Michigan Sales Tax Act is that when National Bank of Detroit makes a retail purchase in Michigan it must pay an additional sum equal to 3 per cent of the sale price, separately stated on the invoice and designated "Michigan Sales Tax." The Michigan court itself in an earlier case stated:

> "The sales tax is a tax imposed upon consumption, a tax upon commodities sold, a tax which is usually and ordinarily paid not by the person who operates the business, but by the customer who purchases and pays for merchandise. Act No. 167, Sec. 23, Pub. Acts 1933." *C. F. Smith Co.* v. *Fitzgerald*, 270 Mich. 659, 677; 259 N.W. 352.

Except as permitted by the National Bank Act, national banks are not subject to state taxation. The Michigan sales tax is not a tax authorized by Congress. The practical effect of the sales tax is to tax National Bank of Detroit. By concluding in its first opinion (Appendix B) that this cause should be tried on the merits, the Michigan Supreme Court recognized the validity of this assertion. Nevertheless, in its second opinion (Appendix E) that court took the inconsistent position that the practical effect of the Michigan Sales Tax Act is not controlling, but that the bank's federal rights are determined by the State's characterization of the tax as a tax on retailers.

It is submitted that the second holding disregards and conflicts with the mandate of this Court in the *Richfield*

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practical operation and effect the tax is in part a tax upon federal bonds." (Emphasis supplied.)

Macallen Co. v. *Massachusetts*, 279 U.S. 620, 625-626:

"* * * neither state courts nor legislatures, by giving the tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect. * * * And this court must determine for itself by independent inquiry whether the tax here is what, in form and by the decision of the state court, it is declared to be * * *."

Carpenter v. *Shaw*, 280 U.S. 363, 367-368:

"Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the *real nature of the tax* and its effect upon the federal right asserted." (Emphasis supplied.)

and other cases cited above. The conflict merits resolution by this Court.

(2) *The opinion of the Supreme Court of Michigan disregards the scope of the immunity afforded national banks by the National Bank Act.*

National Bank of Detroit relies in large measure for its immunity from the Michigan sales tax on Sec. 5219 U.S.R.S. (12 U.S.C. § 548). This federal statute permits the states to tax national banks, in addition to taxes on their real property, in the following ways:

> "The several States may (1) tax said shares [of banks], or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by, their net income * * *."

It should be noted that this federal statute permits the imposition by the several States of but one of the four alternative taxes therein specified. The State of Michigan has adopted the first method by assessing its intangibles tax upon National Bank of Detroit's shares of stock. It is thereby precluded from levying any other form of tax upon that bank.

It should also be noted that the third and fourth methods contemplate taxes the direct "legal incidence" of which is on national banks themselves, but that the first and second taxes fall on others and hence burden the banks themselves only indirectly. In view of this observation, there can be no validity to an argument that the statute regulates only those state taxing measures that levy a direct tax upon national banks.

This Court has commented vigorously on the protection afforded national banks by the National Bank Act:

> "This section, then, of the Revised Statutes is the measure of the power of a State to tax national banks,

> their property or their franchises. * * * Any state tax therefore which is in excess of and not in conformity to these requirements is void." *Owensboro National Bank* v. *Owensboro,* 173 U.S. 664, 669.
>
> "There is also no doubt from the section that it was intended to comprehensively control the subject with which it dealt and thus to furnish the exclusive rule governing state taxation as to the federal agencies created as provided in the section. All possibility of dispute to the contrary is foreclosed by the decisions of this court." *Bank of California* v. *Richardson,* 248 U. S. 476, 483.

Nevertheless, the Michigan court has held that this section, intended to "comprehensive control" the States' right to tax the banks, is ineffective to protect National Bank of Detroit from the impact of the Michigan sales tax on its purchases, merely because the State has designated its levy a tax on retailers. If this restrictive construction of the federal statute by the state court is upheld, there will be no practical limit to state power to tax national banks. This construction of the National Bank Act should be reviewed by this Court.

(3) *The opinion of the Supreme Court of Michigan conflicts with two recent decisions of this Court.*

Finally, the federal question here presented is substantial because of the conflict of the Michigan court's decision with the rulings of this Court in *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.,* 314 U.S. 95, and *Carson* v. *Roane-Anderson Co.,* 342 U.S. 232. Both cases involved the imposition of state sales taxes on purchases by federal instrumentalities. Each of the federal agencies enjoyed immunity from state taxation conferred by act of Congress. In each case this Court held the state tax repugnant to the federal act, and therefore invalid.

Like the Michigan tax, the sales taxes involved in the *Bismarck* and *Roane-Anderson* cases were nominally im-

posed on the retailer, who in turn collected them from the federal purchasers. The only distinction between the North Dakota statute in *Bismarck* and the Michigan Sales Tax Act is that the North Dakota act *directed* the retailer to collect the tax from the purchaser, whereas the Michigan statute *permits* the retailer to do so *and prohibits his stating that he has not done so.*[1] The details of incidence and collection of the Tennessee tax were not discussed in the *Roane-Anderson* opinion, but they do not vary materially from the North Dakota or Michigan acts. (Pertinent provisions of the Tennessee Retailers Sales Tax Act are included herewith as Appendix I.)

In practical effect there is no difference between the sales taxes considered by this Court in *Bismarck* and *Roane-Anderson* and that presented here. In all three cases the tax is actually paid by the federal purchaser, in violation of the immunity conferred by Congress. The conflict between the instant case and the holdings of *Bismarck* and *Roane-Anderson* deserves review.

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[1] Compare Sections 6 and 7 of the North Dakota act, quoted in the margin of the report of the *Bismarck* case, 314 U.S. 95, 97-98, with Section 23 of the Michigan statute appearing in Appendix G hereof.

CONCLUSION

The Michigan Supreme Court has violated this Court's mandate by disregarding substance in favor of form. It has narrowly construed the National Bank Act to nullify federal control of state taxation of national banks. Finally, its decision conflicts with two recent opinions of this Court, each closely in point. In each of these respects the decision below presents a substantial federal question.

WHEREFORE, this Honorable Court is respectfully requested to note its jurisdiction of this matter and to docket the same for plenary consideration of the questions presented.

Respectfully submitted,

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APPENDIX A

OPINION OF THE HONORABLE FRANK B. FERGUSON, CIRCUIT JUDGE

(Filed January 15, 1951)

The plaintiff filed its petition for a declaration of rights as to whether or not it is required to pay a sales tax (1) upon purchases by plaintiff from Michigan vendors of tangible personal property; (2) on retail sales of tangible personal property made by plaintiff, claiming that the general sales tax act, as amended, is an illegal encroachment upon the statutory immunity of plaintiff as established by the Congress of the United States of America.

Plaintiff claims that it purchases office supplies, equipment, automobiles, machinery, furniture, food and various other types of tangible personal property from vendors in Michigan, and that in addition to operating a bank, it also operates a cafeteria or restaurant and sells food and beverages to its employees.

The defendant has filed a motion to dismiss the petition for a declaration of rights under the general sales tax act, as amended, insofar as it seeks to have a determination as to whether or not plaintiff is exempt from the payment of sales tax on tangible personal property which it purchases from vendors in Michigan.

The motion to dismiss does not question plaintiff's right to file a petition for a declaration of rights as to whether it is required to pay a sales tax upon its retail sale of food and beverages in the restaurant business. Therefore, if this motion is granted, plaintiff's petition will not be dismissed in its entirety, but will be limited to a determination of plaintiff's liability for the payment of a tax upon its restaurant business.

It is defendant's position that the plaintiff is not a tax-

payer under the act and, therefore, is not the real party in interest and cannot question the validity of the act which requires a retailer, who sells tangible personal property to plaintiff, to pay a sales tax upon said sale.

The act in question is Act 167, P.A. 1933, as amended. It is known as the Michigan Sales Tax Act.

Sec. 2 reads:

> "There is hereby levied upon and there shall be collected from all persons engaged in the business of making sales at retail, as hereinbefore defined, an annual tax for the privilege of engaging in such business equal to 3 per cent of the gross proceeds thereof, plus the penalty and interest when applicable as hereinafter provided, less deductions allowed in sections 4 and 4a. * * * The taxes levied hereunder shall be a personal obligation of the taxpayer. * * *"

Sec. 3 requires a retailer to take out a license to conduct his business for the current tax year; and provides further that no person shall engage or continue in any business taxable hereunder without first securing a license.

Sec. 6 requires that the taxpayer shall make certain monthly returns to the Department of Revenue, showing the amount of sales, moneys and proceeds of his business and to transmit with said return the amount of the tax which he is liable for.

Sec. 23 reads:

> "No person engaged in the business of selling tangible personal property at retail shall advertise or hold out to the public in any manner, directly or indirectly, that the tax herein imposed is not considered as an element in the price to the consumer. Nothing contained in this act shall be deemed to prohibit any taxpayer from reimbursing himself by adding to his sale price any tax levied hereunder: Provided, however, that no person other than the state may enrich himself or gain any benefit from the collection or payment of such tax."

An examination of the provisions of the above sections and other sections of the general sales tax act clearly indicates that the tax is one imposed on the retailer for the privilege of doing business in the State of Michigan. The retailer alone is liable for the payment of the tax. There is nothing in the act which requires the retailer to collect a tax from the consumer, and if he does collect a tax from the consumer, he is not prohibited from doing so, because under Sec. 23 it is clearly stated that nothing contained in the act shall be deemed to prohibit any taxpayer from reimbursing himself by adding to his sale price any tax levied under this act. This provision does not make a consumer a taxpayer under this act. Therefore, the relationship of sovereign and taxpayer is between the State of Michigan and the retailer, not beween the State of Michigan and a purchaser.

Our Supreme Court has held that the sales tax is not a property tax but a privilege tax imposed upon the privilege of making retail sales, measured by gross proceeds from such sales less deductions allowed by statute.

> Montgomery Ward vs. Fry, 277 Mich. 260;
>
> Gardner-White Co. vs. State Board of Tax Administration, 296 Mich. 225.

Other states having similar statutes have followed this interpretation. In Meyer Construction Co. vs. Corbett, 7 F. Supp. 616, the Court stated:

> "The Retail Sales Tax Act creates the relationship of sovereign power and taxpayer between the state and the retailer, and not between the state and the consumer."
>
> See also Western Lithograph Co. vs. State Board of Equalization, 78 P. 2d 731 (Cal).

The Declaratory Judgment Act, Act 36 P.A. 1929, Sec. 27.501 M.S.A., reads:

> "No action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby, and the court may, in cases of actual controversy, make binding declarations of rights whether any consequential relief is or could be claimed, or not, including the determination at the instance of anyone interested in the controversy, of the construction of any statute, municipal ordinance or other governmental regulation, or any deed, will or other instrument in writing, and a declaration of the rights of the parties interested, but the foregoing enumeration does not exclude other cases of actual controversy."

It is to be noted that under this act no person may ask the Court for a declaratory judgment unless there is an actual controversy between the parties in said suit.

Any declaration of rights made in this case between the plaintiff, who is a consumer, and the defendant would not be binding upon any retailer who has not been made a party to this suit.

In Washington-Detroit Theatre Co. vs. Moore, 249 Mich. 673, the Court held that a case for declaratory judgment must rest upon an actual controversy and formally presented with proper parties.

Callaghan's Michigan Pleading and Practice, Vol. 1, 1573, reads:

> "• • • 'necessary' parties are all those who have such interest in the subject matter of litigation that a final adjudication cannot be made without affecting their rights or leaving material issues undetermined. All such persons must be joined or brought in, otherwise the suit is subject to dismissal because of their nonjoinder, unless some satisfactory reason can be shown why they cannot be joined and it appears that they are fairly represented by others. • • •"

Sec. 27.653 M.S.A. reads as follows:

> "Sec. 2. Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. * * *"

In Woodley vs. Lancaster, 307 Mich. 473, the Court held that provisions of a statute requiring that every action shall be in the name of the real party in interest was mandatory, and that if the real party in interest were not in the litigation, the Court would have no jurisdiction to decide the issues before it.

In Southern Ry. Co. vs. Curry, 194 So. 523, the Supreme Court of Alabama held that, a railroad company as purchaser of slag could not have the question of whether sales of slag were subject to provisions of the sales tax act determined; that the purchaser had no standing in court for declaratory relief or otherwise, because it could not render a binding decision between the taxpayer and the taxing authorities. The Court said:

> "(3) But whether it is or not, the seller seems to be making no complaint, and the purchaser not being the taxpayer, eo nomine, is in no position to have that question determined for the person against whom the tax is levied, and a judgment, assuming that the court had jursidication to render same, declaratory or otherwise, as between the Railroad Company and the State or its taxing authorities, would be without binding force as between the State and its authorities and the Woodstock Slag Corporation. Section 6, Declaratory Act, Gen. Acts 1935, p. 778. See, also, State Tax Commission et al. vs. Commercial Realty Co., 236 Ala. 358, 182 So. 31."

In Rinn vs. Bedford, 84 P.2d 827, the Supreme Court of Colorado said:

> "In the exaction of the tax on services rendered to or for the plaintiffs by others he of course has no concern and he cannot raise the constitutional questions thereon. That the price charged him for such services of others is fixed by the addition of the amount of the tax or of any other factor does not entitle the plaintiff to complain. He may take the service as offered or he may leave it."

In Central Transfer Co. vs. Commercial Oil Co., 45 F. 2d 400, it was held that a consumer and user of gasoline was not entitled to raise the question of the constitutionality of the Missouri motor fuel law imposing a tax on gasoline where, under the terms of the statute, the tax was laid directly upon the dealers and distributors and not upon the consumer. The decision of the Court was based upon the reasoning that one indirectly or remotely injured by the imposition of the tax cannot raise the question of the constitutionality of the statute imposing the tax.

To the same point are the following cases:

Massachusetts vs. Mellon, 262 U.S. 447;
Williams vs. Riley, 280 U.S. 78;
King vs. Baker, 288 N.W. 565;
Socony-Vacuum Oil Co. vs. City of New York, 287 N.Y. Supp. 288;
Doby vs. State Tax Commission, 174 So. 233.

For the reasons herein stated, I find that, plaintiff is not the taxpayer under the general sales tax act, is not the real party in interest and is not entitled to a declaratory judgment as to whether or not the State may levy a tax on a retailer who sells personal tangible property to the plaintiff. Therefore, defendant's motion is granted.

/s/ FRANK B. FERGUSON,
Circuit Judge.

Dated: January 15, 1951.

APPENDIX B

OPINION OF THE SUPREME COURT OF MICHIGAN

(334 Michigan 132, 64 N.W.2d 278)

(Filed June 27, 1952)

Before the Entire Bench, except NORTH, C. J.
BUTZEL, J.

Plaintiff, National Bank of Detroit, on behalf of itself and also of all national banking associations in Michigan, filed a petition under the declaratory judgment act (PA 1929, No 36 [CL 1948, § 691.501 *et seq.* (Stat Ann § 27.501 *et seq.*)]) for a declaration of rights as to their liability for payment of Michigan sales tax, alleging that the provisions of the Michigan sales tax act (PA 1933, No 167, as amended [CL 1948, § 205.51 *et seq.* (Stat Ann 1950 Rev § 7.521 *et seq.*)]) conflict with section 5219 of the Revised Statutes of the United States (12 USCA, § 548) as to retail purchases made by plaintiff from Michigan vendors, and to retail sales made by plaintiff to Michigan vendees. Defendant, Michigan department of revenue, is charged with the administration of the sales tax system. Prior to July 1, 1949, it was recognized that sales of personal property at retail both to and by national banking associations were exempt from the imposition of the sales tax. However, since the sales tax act was amended by PA 1949, No. 272, it has been interpreted to mean that both types of sales are subject to the tax. It is alleged, and not denied, that without paying such sales taxes, plaintiff would be unable to purchase in Michigan personal property necessary for its business; and that it is also required to collect such tax from its vendees whether in the conduct of running a restaurant for its employees or reselling personal property it acquires by foreclosure of liens or otherwise in the conduct of its business.

Plaintiff contends that it is a Federal instrumentality and that the imposition of such sales tax is in conflict with its Federal statutory and constitutional immunity. That question is not presented on this appeal so we shall not discuss it.

Defendant in a motion alleged, and the trial court found, that as plaintiff is not the taxpayer under the sales tax act, and is not the real party in interest, it is not entitled to institute an action to the extent of determining whether or not taxes could be levied on sales to it. Accordingly, an order was entered dismissing that portion of plaintiff's petition concerned with the imposition of the sales tax on sales to plaintiff by Michigan vendors. Plaintiff appeals from that order.

Provisions of the sales tax act material to the present issue are (as amended by PA 1949, No. 272):

> "Section 1. That when used in this act:
>
> "(a) The term 'person' includes any individual, firm, copartnership, joint venture, association, social club, fraternal organization, municipal or private corporation whether organized for profit or not, company, estate, trust, receiver, trustee, syndicate, the United States, state of Michigan, county, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context. * * *
>
> "(1) The word 'taxpayer' means any person subject to any tax hereunder. * * *
>
> "Section 2. There is hereby levied upon and there shall be collected from all persons engaged in the business of making sales at retail, as hereinbefore defined, an annual tax for the privilege of engaging in such business equal to 3 per cent of the gross proceeds thereof, plus the penalty and interest when applicable as hereinafter provided, less deductions

allowed in sections 4 and 4a. * * * The taxes levied hereunder shall be a personal obligation of the taxpayer.

"Section 4. In computing the amount of tax levied under the provisions of this act for any month, * * *

"No person subject to a tax under this act need include in the amount of his gross proceeds used for the computation of the tax any proceeds of his business derived from sales to the United States, its unincorporated agencies and instrumentalities, any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States, the American Red Cross and its chapters and branches, and the state of Michigan or its departments and institutions or any of its political subdivisions.

"Section 4a. No person subject to tax under this act need include in the amount of his gross proceeds used for the computation of the tax any sales of tangible personal property [enumerating numerous exemptions not material here]. * * *

"Section 23. No person engaged in the business of selling tangible personal property at retail shall advertise or hold out to the public in any manner, directly, or indirectly, that the tax herein imposed is not considered as an element in the price to the consumer. Nothing contained in this act shall be deemed to prohibit any taxpayer from reimbursing himself by adding to his sale price any tax levied hereunder: Provided, however, That no person other than the state may enrich himself or gain any benefit from the collection or payment of such tax."

Other sections of the act, not material here, concerning the administration and collection of the tax, consistently refer in the context to the "taxpayer" as the retailer. It is alleged and not denied, however, that the economic burden of the tax is always passed on to the

consumer, and that such was the intent of the legislature when formulating the sales tax act, as evidenced by section 23 thereof, *supra,* (CL 1948, § 205.73, as amended by PA 1949, No 272 [Stat Ann 1950 Rev § 7.544]).

It is significant that the Michigan department of revenue has stated its understanding of the true incidence of the tax in regulation 22 of its rules and regulations, as follows:

> "A taxpayer must include the sales tax as part of the selling price of tangible personal property sold by him. He is not required to state the tax as a separate item to the consumer, but he may not advertise or hold out to the public in any manner directly or indirectly that the tax is not considered as an element in the price to the consumer."

Although exemptions from the operation of the sales tax are now stated in sections 4 and 4a (CL 1948, §§ 205.54, 205.54a, as amended by PA 1949, No 272 [Stat Ann 1950 Rev §§ 7.524, 7.525]), concerning permissible deductions from gross proceeds, prior to 1949 there was a provision in section 4, subd (b), which read in part:

> "As a consumer, the United States * * * shall not be liable for the payment of the tax."(*)

It is obvious from a reading of regulation 22 that the change in the wording of section 4 was made merely for the purpose of clarity in the operation of the act and did not change its substantive effect.

The parties discuss at some length whether or not an actual case and controversy exists here; who is the real party in interest in the action, retailer or consumer; whether the retailer should not have been the party plaintiff; and whether or not plaintiff is entitled to seek a declaration of rights under the declaratory judgment act. The main question presented in this appeal is whether a

(*) See CL 1948, § 205.54, prior to amendment.

justiciable question is presented, when the court is asked to consider the economic realities of the situation, and treat the plaintiff as the real "taxpayer" under the Michigan sales tax act, for the purposes of an action in which it claims immunity as a Federal instrumentality.

We assume that the direct *legal* incidence of the Michigan sales tax act falls upon the retailer. Indeed, no other conclusion can be reached after examining carefully the method in which the sales tax operates. It is expressly termed a tax on gross proceeds and is paid to defendant in bulk, not per transaction, by the retailer who is entitled to a discount on the amount collected and paid to defendant. The retailer is personally obligated for the payment of the tax due. However, he is authorized to collect an amount equal to the tax levied by adding it to the purchase price of his goods, and he is forbidden to hold out to the consumer that such is not being done. It is, therefore, clear that it was the intention of the legislature that the general sales tax is a tax whose economic burden falls chiefly on the consumer. That the collection of such tax from the consumer is in some degree an economic burden upon the retailer cannot be denied and it is in this sense, economically speaking, that the general sales tax is a tax on the privilege of doing a retail business in the State. It may seem paradoxical to say that the retailer only is an interested party when there is properly and legally added to the sales price to the consumer the 3 per cent sales tax on almost every purchase and this amount is remitted to the State by the retailer after the deduction of a discount.

We made this economic distinction in *C. F. Smith Co.* v. *Fitzgerald*, 270 Mich 659. Therein we said, in answer to a challenge to the validity of the chain store tax (pp 676, 677, 685, 686):

> "The tax is not void because it constitutes double taxation. The tax in question is a license tax,—a

tax upon the privilege of operating chain stores or mercantile establishments. It is contended it constitutes double taxation because there is already imposed under the law of Michigan a sales tax based upon the amount of business done. PA 1933, No 167. The tax imposed by PA 1933, No 265 is upon the privilege to operate chain stores. *The sales tax is a tax imposed upon consumption, a tax upon commodies sold, a tax which is usually and ordinarily paid not by the person who operates the business, but the customer who purchases and pays for merchandise.* PA 1933, No 167, § 23. (Italics added.)

* * *

"The chain store tax is a franchise tax or fee imposed for the privilege of establishing, opening, maintaining or operating two or more stores. * * * The general sales tax is a privilege tax imposed upon the privilege of making retail sales, measured by the gross proceeds of such sales, less deductions allowed by statute."

Defendant relies on *City of Wyandotte* v. *State Board of Tax Administration*, 278 Mich 47, in which we considered the question as to whether sales to nonexempt individuals from municipally-operated utilities should be exempt from taxation. After finding that a municipality was not subject to the sales tax, we held that such sales were also exempt, saying (p. 53):

"The tax is not imposed upon the consumer, but upon those 'engaged in the business of making sales at retail as hereinbefore defined,' et cetera. (Section 2)."

The case refers to *C. F. Smith Co.* v. *Fitzgerald, supra*, and does not overrule it.

Subsequent Michigan cases reaffirmed the "legal incidence" doctrine, that the sales tax is a privilege tax exacted for the privilege of engaging in the business of selling tangible personal property and measured by the

gross proceeds of such sales. However, none are determinative here. In *Montgomery Ward & Co.* v. *Fry,* 277 Mich. 260, mail order sales in which the goods were sent from a mail order house in another State were held to be in the course of interstate commerce and beyond the taxing power of the State. In *Standard Oil Co.* v. *State of Michigan,* 283 Mich 85, it was held that the sales tax was not payable on Federal gasoline tax and that certain deductions would not be allowable on trade and quantity discounts. *City of Bay City* v. *State Board of Tax Administration,* 292 Mich 241, held that it was in the power of the State to impose the sales tax upon the operation of municipally-owned utilities when they are in the exercise of a proprietary function. In *Gardner-White Co.* v. *State Board of Tax Administration,* 296 Mich 225, we held that upon conditional sales the retailer should compute the tax on the full sale price and upon recapture of property for nonpayment of installments there is no refund or right to credit. *Howard Pore, Inc.* v. *State Commissioner of Rev. enue,* 322 Mich 49 (4 ALR 2d 1041), dealt with the problem of how to measure "gross proceeds" when trade-in property was involved. It must be noted that none of these cases deal with a claimed Federal immunity, nor did consumers ask for an adjudication of their rights.

Before passing on to Federal decisions on this issue, however, it is well to note the existence of the Michigan use tax, PA 1937, No 94 (CL 1948, § 205.91 et seq. [Stat Ann 1950 Rev § 7.555 (1) *et seq.*]. This has been held to be a tax for the privilege of using, storing and consuming tangible property brought from out of the State after it has come to rest. *Goebel Brewing Co.* v. *State Board of Tax Administration,* 306 Mich 222; *Western Electric Co.* v. *Department of Revenue,* 312 Mich 582. Its intent is to reach those purchases by Michigan consumers not reached by the sales tax act. The two acts peculiarly intercorrelate

and in some respects the latter is complementary to the former. *Kress* v. *Department of Revenue*, 322 Mich 590. The presence of a use tax in our tax system lends further support to the proposition that retailers are used only as a conduit or means of collection from consumers of a sales tax; for when that method is not effective, other and more direct collection from the consumer is accomplished by the use tax if the purchase is made out of the State. This would be obviously unnecessary if the purpose of a sales tax were merely to exact the tax from Michigan retailers and the consumer was not a party in interest.

Counsel have cited numerous authorities from United States jurisdictions possessing similar sales tax acts. The most that can be said after a study of the authorities is that the courts are divided, and that even the decisions of an individual State may vary from time to time.

We turn to the decisions specifically involving the immunity of Federal instrumentalities from such a tax to determine what theories have been applied, and most particularly to the decisions of the United States Supreme Court.

In an earlier case, *Williams* v. *Riley*, 280 US 78 (50 S Ct 63, 74 L ed 175), it was held that the purchaser of motor vehicle fuel cannot question the constitutionality of a tax imposed on distributors, whereby the cost to him was enhanced. The distributor was legally liable for the tax, but the entire burden of the tax was passed on to the consumer. Six Justices felt that no direct injury was threatened and that the purchaser had no standing. Three Justices, however, dissented. In *Carpenter* v. *Shaw*, 280 US 363 (50 S Ct 121, 74 L ed 478), decided soon thereafter, however, it was held that the characterization given to a State tax by State courts or legislatures is not binding where a Federal right is concerned and did not relieve

the court from considering the real nature of the tax and its effect upon a Federal right. The court went on to hold a tax on oil royalties actually a tax on real estate of the kind forbidden in certain Federal leases. A similar situation developed in *Stahmann* v. *Vidal*, 305 US 61 (50 S Ct 41, 83 L ed 41), where the court looked into the purpose of the Bankhead Cotton act and found that it was to place a burden on the producer thereof by taxation in an attempt to restrict production even though the ginner was given the legal responsibility for collection and payment of the tax, and that the producer could maintain an action to challenge the act.

Colorado National Bank of Denver v. *Bedford*, 310 US 41 (60 S Ct 800, 84 L ed 1067), involved a Colorado "service tax" which assessed a percentage tax against users of safety deposit services. The banks were required to collect such taxes in a manner similar to that existing under the Michigan sales tax act today. It was held that the collection of the tax did not impose an unconstitutional burden on a Federal instrumentality. The court said, on p 52:

> "The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself. The funds which were received by the State came from the assets of the user, not from those of the Federal instrumentality, the bank. The Colorado Supreme Court holds the user is the taxpayer. the determination of the State court as to the incidence of the tax has great weight with us, and, when it follows logically the language of the act, as here, is controlling."

Alabama v. *King & Boozer*, 314 US 1 (62 S Ct 43, 86 L ed 3, 140 ALR 615), held there was no immunity from paying added costs attributable to taxes on those who furnish supplies to the government and who have been granted no tax immunity even though the government by reason of the

contract eventually bore the economic burden thereof, because cost-plus construction contracts had not been granted immunity by act of Congress. No question was raised as to who was the "real party in interest." That such a ruling was not intended to apply to Federal land banks was made clear by a holding in *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 US 95 (62 S Ct 1, 86 L ed 65). Involved was the North Dakota sales tax act which is similar to the Michigan sales tax act with the additional provision that "Retailers shall add * * * to the sales price * * * and when added * * * shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts." The North Dakota court construed the sales tax as imposed upon the purchaser. The United States Supreme Court accepted the construction of the North Dakota court and exempted the Federal land bank from taxes paid on materials bought in aid of its lending functions.

United States v. *County of Allegheny*, 322 US 174 (64 S Ct 908, 88 L ed 1209), and *Federal Land Bank of New Orleans* v. *Crosland*, 261 US 374 (43 S Ct 385, 67 L ed 703, 29 ALR 1), decisions in which it was held that the validity of the tax was not dependent upon the ultimate resting place of the economic burden of the tax, may be distinguished as both involved direct property taxes on instrumentalities of the Federal government.

The most recent decision as to the rights of the consumer claiming a Federal immunity was *Richfield Oil Corp.* v. *State Board of Equalization*, 329 US 69 (67 S Ct 156, 91 L ed 80). It is particularly significant because in previous cases involving privilege taxes measured by gross proceeds, the State court's interpretation of the effect of the tax was accepted. Here, however, the United States Supreme Court indicated that such was not the determining factor. The Richfield Oil Corporation argued that

the tax was a tax on exports when placed on oil to be delivered out of the State. The California Supreme Coure held that no question of exports was involved as the tax was levied on the retailer, who was authorized to collect the tax from the consumers, and that the tax was not laid on the consumer and not a tax on the sale or because of the sale. The question of whether the tax deprived the taxpayer of a Federal right, however, said the court, "turns not on the characterization which the State has given the tax, but upon its operation and effect."

Carson v. *Roane-Anderson Co.*, 342 US 232 (72 S Ct 257, 96 L ed 257), decided this year, held that all activities of the Atomic Energy Commission were exempt from the payment of Tennessee sales tax, by reason of a provision of the Atomic Energy act granting such immunity. Although there appeared to be some doubt in the State court as to whether the taxes were to be considered as levied on the retailers who sold to the AEC or the persons who bought for the use of the AEC, this question was not mentioned by the court, who evidently assumed the determination to be immaterial when a Federal right was involved as decided in the *Richfield case, supra.*

In section 4 and 4a of the amended sales tax law, *supra,* certain persons, institutions, and articles are exempted from the sales tax and the proceeds from such sales need not be included in the returns to the State. The query arises, assuming sales to national banks are exempt from sales tax by Federal law, is not such immunity as effective as if it were expressly included in sections 4 and 4a *supra*? We see no reason why the effect of the immunity, whether granted by Michigan statute or by the Federal law, should not be the same.

It is of interest to note that the internal revenue code permits the deduction of the amounts paid for sales tax by the consumer to his vendor, the same as if such amount

constituted a tax imposed upon and paid by the consumer. 26 USCA, § 23(c) (3). It thus recognizes the legal incidence of the tax and the economic burden on the consumer, who pays the tax.

The conclusion we draw from the above review of the facts and authorities is as follows: It is a justiciable question whether or not national banks can assert Federal immunity from State sales and excise taxes, regardless of whether or not the legal incidence of the tax falls upon a national bank. The consumer bank may plead that it has been deprived of a Federal right especially when the burden of the tax falls upon it in an economic sense, and will not be deprived of a hearing as to the claimed Federal immunity.

The plaintiff calls attention to the fact that as vendee at retail it is called upon to tax, and that as vendor and retailer of other articles, it again is asked to pay the tax, though in the latter case it may collect it from the vendees. This indicates how closely the two problems are involved in the instant suit and how proper it is to include them both in plaintiff's petition.

We find, therefore, that a purchaser of tangible personal property at retail within this State, claiming a Federal immunity from the provisions of the Michigan sales tax act, may invoke the jurisdiction of this court to determine the question of the taxability of the proceeds of a retailer derived from its sales, which tax in turn is passed on under the law to the purchaser or consumer. An actual controversy does exist between the parties: plaintiff claiming immunity from the economic burden of the tax, and defendant contending that no immunity exists.

The Michigan declaratory judgment act states at Section 1:

> "The court may, in cases of actual controversy, make binding declarations of rights whether any consequential relief is or could be claimed, or

> not, including the determination at the instance of anyone interested in the controversy, of the construction of any statute, * * * and a declaration of the rights of the parties interested."

Section 7 provides:

> "This act is declared to be remedial, and is to be liberally construed and liberally administered with a view of making the courts more serviceable to the people."

It should need no further citation of authority to indicate, in view of what has been said above, that an actual controversy within the scope of the declaratory judgment act exists.

Defendant contends, and the lower court decided, that the instant suit was improper as the results of it would not be binding on the retailer-taxpayer who is not joined in this suit. The retailer, however, has no interest in this action beyond that of a mere collection agent or intermediary and will abide by the final determination of the question. We have carefully considered defendant's other contentions herein, and have found them to be without merit.

The order dismissing that portion of plaintiff's petition concerned with the imposition of the sales tax on sales to plaintiff by Michigan vendors is reversed, without costs, a public question being involved. The case is remanded for further proceedings.

DETHMERS, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

APPENDIX C

OPINION OF HONORABLE ADOLPH F. MARSCHNER, CIRCUIT JUDGE

(Filed October 1, 1953)

This is a petition for a declaration of rights filed by the plaintiff, a national banking association. The Michigan Department of Revenue, defendant, is a duly registered agency of the State of Michigan charged with the enforcement and administration of the Michigan sales tax (M.S.A. Sec. 7.521 *et seq.*).

The petition alleges that in the ordinary course of its business plaintiff has purchased and does purchase from vendors in the State of Michigan a quantity of office supplies, automobiles equipment, furniture, machinery, food and various other types of tangible personal property; that in the ordinary course of its business it also operates a cafeteria or restaurant and does presently sell food and beverages to its employees; that likewise in the course of its business plaintiff acquires from time to time the ownership of automobiles and other types of tangible personal property by reason of its foreclosure of chattel mortgages, or in the exercise of its legal rights under various forms of security agreements with persons who borrow money from it, which chattels are sold to purchasers domiciled in the State of Michigan and elsewhere; alleging further that an actual controversy exists between it and other national banking asssociations and the defendant, and that a declaration of rights would avoid a multiplicity of proceedings concerning the general issue in controversy.

The petition requests:

> "(a) That this Court declare that the tax imposed by Act 167 of the Public Acts for the State of Michigan for 1933, as amended, does not apply to retail sales of tangible personal property to Plaintiff,

or, in the alternative, that the application of said Act to such sales is invalid as an illegal encroachment upon the statutory immunity of Plaintiff from any such tax, as established by the Congress of the United States of America.

"(b) That this Court declare that the tax imposed by Act 167 of the Public Acts for the State of Michigan for 1933, as amended, does not apply to retail sales of tangible personal property by Plaintiff, or, in the alternative, that the application of said Act to such sales is invalid as an illegal encroachment upon the statutory immunity of Plaintiff from any such tax, as established by the Congress of the United States of America."

At a previous hearing of the instant case (*National Bank of Detroit* v. *Department of Revenue of the State of Michigan*, 334 Mich. 132) on a motion to dismiss by the defendant the court held:

"We find, therefore, that a purchaser of tangible personal property at retail within this State, claiming a Federal immunity from the provisions of the Michigan sales tax act, may invoke the jurisdiction of this Court to determine the question of the taxability of the proceeds of a retailer derived from its sales, which tax in turn is passed on under the law to the purchaser or consumer. An actual controversy does exist between the parties: Plaintiff claiming immunity from the economic burden of the tax, and defendant contending that no immunity exists."

The issue, as presented by plaintiff in its brief, is whether the National Bank Act (Section 5219 R.S.U.S.) prevents the imposition of the Michigan sales tax upon plaintiff's purchases. This Section, in part, provides:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) in-

clude dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause."

Plaintiff concludes that the defendant is acting contrary to law in instructing Michigan retailers that they are liable for the Michigan sales tax incurred as a result of their sales of tangible personal property to the plaintiff.

Defendant denies that Section 5219 is an exemption provision but asserts that it permits certain forms of taxation on national banks which were precluded prior to the enactment of such statutory provision by the plaintiff's implied constitutional immunity. Defendant admits that the plaintiff, as an intrumentality of the Federal Government, is exempt from the imposition of state taxes except a tax on real or personal property and a tax permitted under this section because of its implied constitutional immunity; but denies that plaintiff, as a result of its constitutional immunity, is exempt from the Michigan sales tax that is legally imposed upon a retailer for the privilege of doing a retail business in Michigan.

An additional question is the scope of plaintiff's constitutional immunity concerning the conduct of a cafeteria operation for its employees.

The Michigan sales tax is imposed upon persons and particularly those that conduct a retail business within this State. The base of the tax is the gross proceeds derived from such sale by a retailer, and does not require such retailer to pass on, as a matter of law or economic fact, any part of such tax.

Plaintiff bases its right to relief upon:

McCulloch v. *Maryland,* 4 Wheat. 316, 4 L. Ed. 579

Federal Land Bank of St. Paul v. *Bismarck Lumber Co.,* 314 US 95

Richfield Oil Corporation v. *State Board,* 329 US 64

Carson v. *Roane-Anderson,* 342 US 232

cases involving direct taxation on the national bank or instrumentality of the Federal Government. In *Federal Land Bank of St. Paul* v. *Bismarck Lumber Company,* it appears that the North Dakota sales tax was imposed upon the purchaser. The legal incidence of the Michigan sales tax is on the seller and not on the purchaser.

> "1. It is clear that the North Dakota statute makes the purchaser, petitioner herein, liable for the sales tax. * * * The Supreme Court of North Dakota has held that the sales tax is laid upon the purchaser. *Jewel Tea Co.* v. *State Tax Commissioner,* 70 N.D. 229, 293 NW 386. This holding was reaffirmed in the decision below. These determinations of the incidence of the tax by the state court are controlling, and respondents concede the point."

In the *Richfield Oil Case* the constitutional prohibition against a state imposing a tax on imports was involved. And in *Carson* v. *Roane-Anderson Company,* the court held:

> "The taxes fall directly upon activities which the Commission is carrying on through its cost reimbursement contractors. The exemption in Section 9(h) of the Act was intended to protect such activities."
> * * *
> "The meaning of 'activities' as applied either to an individual or to a government agency may be broad enough to include what is done through independent contractors as well as through agents." * * *"

It appears, in considering the import of that decision, that the Tennessee sales tax requires retailers to collect from the purchaser and treats such person as a collection agent for the State of Tennessee. The plaintiff bank is exempt from the payment of the tax under the doctrine of implied constitutional immunity where the legal incidence of the tax falls upon the consumer. Where, however, only the economic burden of the tax is passed, private contractors, purchasers or consumers dealing with the Government are not exempt from such tax in the absence of specific congressional legislation.

> *State of Alabama* v. *King & Boozer*, 314 US 1, 62 S Ct. 43.
>
> *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania*, 318 US 26.

In the latter case it was held:

> "* * * By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government,—for it may be assumed that the regulation if enforcable and enforced will increase the price of the milk purchased for consumption in Pensylvania, unless the government is able to procure a supply from without the state, * * *
>
> "Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which Congressional policy does not require.
>
> "* * * the mere fact that non-discriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation."

Likewise,

> *James* v. *Dravo Contracting Company*, 302 US 134, 58 S Ct. 208.

Western Lithograph v. *State Board of Equalization*, 11 Cal. 2d 156, 78 P2d 731.

Federal Land Bank of St. Paul v. *De Rochford*, 287 N.W. 522, 69 N.D. 382.

Esso Standard Oil Co. v. *Evans*, 73 S Ct. 800.

From the latter decisions it appears that Section 5219 USRS relied upon by plaintiff does not preclude defendant from imposing a tax on another even though the economic burden of such tax may be shifted to a national bank. The burden of proving the claimed exemption from state taxation rests upon the plaintiff to establish that it is exempt from the indirect economic burden of the sales tax here involved.

I concur in the opinion filed by Judge Thomas J. Murphy (May 15, 1953) involving the identical question in *Federal Reserve Bank of Chicago* v. *Michigan Department of Revenue.*

Defendant does not strenuously assert its right to impose the tax pertaining to the operation of the cafeteria, and no authorities are offered in support of its contention. It appears from the testimony that this enterprise is operated at a loss specifically for the employees and officers of the bank, and that the general public is excluded except insofar as they are guests of an employee. The maintenance of the lunch room is a convenience solely for its employees.

Decree for defendant is granted.

/s/ ADOLPH F. MARSCHNER
Circuit Judge.

APPENDIX D

DECREE OF WAYNE COUNTY CIRCUIT COURT

(Filed October 27, 1953)

This cause having come on to be heard upon the pleadings and proofs taken therein, and the parties having appeared in open Court by their respective attorneys and presented arguments and submitted briefs thereon, and the Court being fully advised in the premises, and the Court having filed its opinion, the Court finds:

1. Plaintiff is a national banking asociation.

2. The defendant, Michigan Department of Revenue, is a duly constituted agency of the State of Michigan charged with the enforcement and administration of the Michigan Sales Tax Act.

3. In the course of its operations the plaintiff purchases from retail vendors domiciled in Michigan substantial quantities of tangible personal property.

4. In the course of its operations the plaintiff makes retail sales of tangible personal property as follows:

(a) Plaintiff operates a cafeteria wherein it sells food to its officers and employees, but not to the public.

(b) Plaintiff sells chattels acquired by foreclosure.

5. The plaintiff contends that by virtue of the provisions of Revised Statutes of the United States, Section 5219, and of the Constitution of the United States, it is exempt from the payment of the Michigan sales tax with respect to both:

(a) Plaintiff's purchases of tangible personal property from Michigan retail vendors, and

(b) Plaintiff's retail sales of tangible personal property described above.

6. The Michigan Sales Tax Act places the legal inci-

dence of the tax on the retail vendor and not on the purchaser, and does not, as a matter of law, require the retail vendor to pass the tax on to the purchaser.

7. Neither Section 5219, Revised Statutes of the United States, nor the Constitution of the United States, prohibit the application of the Michigan Sales Tax to the proceeds of retail sales to plaintiff by Michigan retail vendors, even though the economic burden of the tax may be passed on to the plaintiff.

8. Section 5219, Revised Statutes of the United States, and the Constitution of the United States, prohibit the application of the Michigan Sales Tax to the proceeds of retail sales of tangible personal property by the plaintiff.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the tax imposed by Act. No. 167 of the Public Acts of 1933, as amended, commonly known as the Michigan Sales Tax Act, applies to the proceeds of retail sales of tangible personal property made by Michigan retailers to plaintiff, and the application of said act to such sales is valid and does not violate plaintiff's statutory and constitutional immunity from taxation.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the tax imposed by said Act No. 167 of the Public Acts of 1933, as amended, does not apply to retail sales of tangible personal property made by plaintiff, and any application of said act to such sales is invalid and in violation of plaintiff's statutory and constitutional immunity from taxation.

/s/ ADOLPH F. MARSCHNER
Circuit Judge.

APPENDIX E

OPINION OF THE SUPREME COURT OF MICHIGAN

(340 Michigan 573, 66 N.W.2d 237)

(Filed October 4, 1954)

Before the Entire Bench.
CARR, J.

The plaintiff is a national banking institution organized under the Federal statute (12 USCA, § 21 *et seq.*; USRS, §5133 *et seq.*). Its principal office is in the city of Detroit and it maintains 43 branches throughout the metropolitan area. In addition to serving its depositors, it acts as agent for the Federal government in the purchase and sale of securities, the issuance and redemption of United States savings bonds, and in other ways. In the course of its operations it purchases from Michigan retailers furniture, office equipment, and other tangible personal property necessary to the conduct of its business. It also operates a cafeteria for the benefit of its employees, to whom it sells food and service, and from time to time sells repossessed merchandise to other parties. The defendant department of revenue is charged by statute with the administration of the Michigan sales tax act.*

Prior to July 1, 1949, the sales tax act was construed as exempting from the tax sales to national banks. Act No 272, § 4, of the Public Acts of that year (CLS 1952, § 205.54, Stat Ann 1950 Rev § 7.524), purported to eliminate such exemption. Thereupon the defendant took the position that the tax was payable on sales made to plaintiff, and retailers added the amount of the tax to their selling price. Plaintiff has also paid the tax on the sales made by it in the course of its operations.

*PA 1933, No 167, as amended (CL 1948 and CLS 1952, § 205.51 *et seq.* [Stat Ann 1950 Rev and 1953 Cum Supp, § 7.521 *et seq.*]).

The present suit was instituted for the purpose of obtaining a declaratory decree† determining whether or not the transactions referred to are subject to the payment of the sales tax imposed on retailers for the privilege of transacting business in this State. Specifically, plaintiff asked in its bill of complaint that the Court declare: 1st, That retail sales of tangible personal property to plaintiff are not subject to the sales tax; and 2nd, That the tax is not applicable to retail sales of tangible personal property made by plaintiff. It is the theory and claim of the plaintiff that since the retailers from whom it makes its purchases in this State habitually include the tax in the selling price the economic burden falls on it, and that, in consequence the tax, in practical effect, is one imposed on it as a result of its purchases. The trial court rejected the contention, pointing out that the Michigan statute does not require, as a matter of law, that any part of the tax shall be passed on by the retailer to the purchaser, and holding that the legal incidence of such tax is on the seller of the merchandise and not on the purchaser. It was further held that sales of merchandise made by plaintiff in the course of its operations are not subject to the tax. A decree was entered accordingly, and both parties have appealed.

The first question raised by plaintiff has been determined by this Court in *Federal Reserve Bank of Chicago* v. *Department of Revenue*, 339 Mich 587. It was there held that sales to a banking association organized under the Federal reserve act (38 Stat 251 [12 USCA, § 221 *et seq.*]) are subject to the tax even though the economic burden is, in the main, passed on to the consumer. After an analysis and discussion of the decisions of the United States supreme court cited by counsel, the conclusion was reached that in case of the sale of merchandise the legal incidence rests on the retailer who

†PA 1929, No 36 (CL 1948, § 691.501 *et seq.* [Stat Ann § 27.501 *et seq.*]).

is made liable to the State for the payment of the tax. The conclusion reached is controlling in the instant case.

Counsel for plaintiff here have suggested, in their briefs and on the oral argument, that the position of a national bank may be distinguished from that of a Federal reserve bank. The claim is based on 12 USCA, § 548 (USRS, § 5219, as last amended by 44 Stat 223). Said section in terms authorizes the State to tax shares of national banks in any one of four specific methods designated. It is argued that Michigan by its intangible tax law has adopted one of such permissible methods, and therefore may not impose a further tax on national banks. We think the argument is fully met by the opinion in the case above cited. Since the legal incidence of the tax does not fall on the purchaser of merchandise but rather on the retailer, such purchaser, in legal contemplation, is not the taxpayer even though the economic burden may be shifted to him.

The reason on which the decision in the *Federal Reserve Bank Case, supra,* was based necessarily leads to the conclusion that as to sales made by it in its cafeteria, and of repossessed merchandise, plaintiff is not subject to the payment of the sales tax. Here the legal incidence of such tax obviously falls on it. Under the doctrine of implied constitutional immunity extended to an instrumentality of the Federal government, as well as under the specific provisions of the National banking act, particularly the section thereof above cited, the State may not impose such tax and the statute may not properly be construed as contemplating it.

The decree of the trial court is affirmed. Neither party having prevailed on its appeal, no costs are allowed.

BUTZEL, C. J., and BUSHNELL, SHARPE, BOYLES, REID, DETHMERS, and KELLY, JJ., concurred.

APPENDIX F

OPINION OF THE SUPREME COURT OF MICHIGAN

(339 Michigan 587, 65 N.W.2d. 639)

(Filed June 7, 1954)

FEDERAL RESERVE BANK OF CHICAGO,
a United States Corporation,
Plaintiff and Appellant,

— vs. —

DEPARTMENT OF REVENUE OF THE STATE OF MICHIGAN,
Defendant and Appellee.

Before the Entire Bench.

DETHMERS. J.

Need persons engaged in the business of making sales at retail who are subject to a tax (Michigan sales tax) under PA 1933, No 167 (CL 1948, and CLS 1952, § 205.51 *et seq.* [Stat Ann 1950 Rev and 1953 Cum Supp § 7.521 *et seq.*]) include in the amount of their gross proceeds used for the computation of the tax any proceeds of their business derived from sales to plaintiff?

Plaintiff is a United States Corporation, an instrumentality and agent of the Federal government, organized and existing under the Federal reserve act (38 Stat 251 [12 USCA, § 221 *et seq.*]). Its stock is owned by those commercial banks which are members of the Federal reserve system and located in the seventh Federal reserve district. From its net earnings the stockholders are entitled by law to receive an annual dividend of 6% on the paid-in capital stock, after payment of which approximately 90% of its net earnings are lawfully turned over annually to the United States treasury. Upon dissolution, after payment of debts, stockholders are entitled to the return of

the par value of their stock, and any remainder goes to the United States government. A major portion of plaintiff's operations consists of furnishing services as fiscal agent, depository, and custodian for the United States government, and for most of such services it is reimbursed by the United States.

Pertinent provisions of the Michigan sales tax act are:

> "Sec. 2. There is hereby levied upon and there shall be collected from all persons engaged in the business of making sales at retail * * * an annual tax for the privilege of engaging in such business equal to 3 per cent of the gross proceeds thereof * * * less deductions allowed in sections 4. * * *
>
> "Sec. 4. * * * No person subject to a tax under this act need include in the amount of his gross proceeds used for the computation of the tax any proceeds of his business derived from sales to the United States, its unincorporated agencies and instrumentalities, any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States, * * *
>
> "Sec. 23. No person engaged in the business of selling tangible personal property at retail shall advertise or hold out to the public in any manner, directly or indirectly, that the tax herein imposed is not considered as an element in the price to the consumer. Nothing contained in this act shall be deemed to prohibit any taxpayer from reimbursing himself by adding to his sale price any tax levied hereunder."

It is evident that retailers are not excused by the provisions of section 4 of the act from including in the amount of their gross proceeds used for the computation of their annual tax for the privilege of engaging in the retail business any proceeds of their business derived from sales to plaintiff because it does not fall within the classification of any of the entities specified in that section, but, on the

contrary, is an incorporated instrumentality of the United States which is not wholly owned by the United States. We are not persuaded by plaintiff's contention that the exempting provisions of section 4 render the act unconstitutional as class legislation because they apply to proceeds derived from sales to the United States, its unincorporated instrumentalities and incorporated instrumentalities if wholly owned by the United States but not to its instrumentalities if incorporated but not wholly owned by the United States. We think that the difference between a corporation wholly owned by the United States and a corporation owned by private persons or corporations and operated, in part, for their benefit affords a valid basis for a difference in classification. In *Banner Laundering Co.* v. *State Board,* 297 Mich 419, we quote with approval from 26 RCL, pp 253, 255, Taxation, §§ 224, 225, to the effect that provisions of a taxing act exempting governmental units or property devoted to public use do not render it invalid as a denial of due process or equal protection of the laws. For reasons of fact, public policy and constitutional considerations the distinction is warranted. If it be the legislative intent, in imposing the tax, to avoid passing the economic burden thereof to the United States or agencies wholly owned by it but to permit that burden to pass to its agencies owned entirely or in part by private interests, as in the case of all other private purchasers, we discern therein no arbitrary or discriminatory classification. The tax levying power vested in the legislature includes the power to exempt therefrom so long as classifications made for that purpose are based, as here, on substantial distinctions and are in accord with the aims sought to be achieved by the act. For an analysis of the types of exemptions in a taxing act which are held to leave the act valid see *Lucking* v. *People,* 320 Mich 495, 504, and cases there cited.

Plaintiff contends that, regardless of the provisions of the State act, retailers need not include in the amount of

their gross proceeds used for the computation of the annual sales tax to be paid by them the proceeds derived from sales to it because of its implied constitutional immunity to State taxation and its express exemption therefrom under section 7 of the Federal reserve act, which reads in part as follows:

> "Federal reserve banks, including the capital stock and surplus therein and the income derived therefrom, shall be exempt from Federal, State, and local taxation, except taxes upon real estate." 12 USCA, §531.

Defendant answers this contention of plaintiff with the assertion that it is the retailer, not the purchaser, who is legally obliged to pay the tax under the Michigan sales tax act and that the plaintiff's immunity and exemption privileges have no application to the obligation of the retailer to pay such tax on his gross proceeds even though they include proceeds derived from sales to plaintiff. It is important to note here that, as distinguished from the sales tax act provisions of some of the other States, the Michigan statute does not require the retailer to collect the tax from the purchaser or consumer. Plaintiff points, however, to the provisions of section 23 of the Michigan act prohibiting the retailer from representing to the public that the tax is not considered as an element in the price to the consumer and permitting him to add it to his sale price. Testimony for plaintiff is that such addition is the general practice of Michigan retailers and that some of plaintiff's suppliers are unwilling to make sales to it unless plaintiff pays them an amount equal to such tax in addition to the regular sales price. Accordingly, plaintiff says that if retailers were to be required to pay the tax on proceeds from sales to it they would pass its burden on and plaintiff would, in fact, be compelled to be the taxpayer in violation of its implied immunity and express exemption from State taxation.

The question presented is novel in Michigan. Both partis cite *National Bank of Detroit* v. *Department of Revenue,* 334 Mich 132. We did not there decide the main question now before us, but only that it was a justiciable one which the plaintiff therein was entitled to have adjudicated. In arriving at that conclusion, as a necessary premise thereto, we held that the direct legal incidence of the tax, and to some extent its economic burden, falls upon the retailer, imposed upon him for the privilege of engaging in the retail business, but that its economic burden falls chiefly upon the consumer. In *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.,* 314 US 95 (62 S Ct 1, 86 L ed 65), the supreme court of the United States held, "These determinations of the incidence of the tax by the State court are controlling." To be determined, accordingly, is whether the implied immunity or statutory exemption enjoyed by plaintiff extends to its shouldering of the economic burden of a tax whose legal incidence rests on the retailer who sells to plaintiff. That being a Federal question, we are bound by such decisions of the United States supreme court as may be in point and decisive. We turn, therefore, to a consideration of the decisions of that court.

Plaintiff's reliance is placed on *Carpenter* v. *Shaw,* 280 US 363 (50 S Ct 121, 74 L ed 478); *Richfield Oil Corp.* v. *State Board of Equalization,* 329 US 69 (67 S Ct 156, 91 L ed 80); *Colorado National Bank of Denver* v. *Bedford,* 310 US 41 (60 S Ct 800, 84 L ed 1067); *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.,* 314 US 95 (62 S Ct 1, 86 L ed 65); and *Carson* v. *Roane-Anderson Co.,* 342 US 232 (72 S Ct 257, 96 L ed 257). *Carpenter* and *Richfield* support plaintiff's position that while the construction placed by the State court on the State taxing act is binding on the supreme court of the United States even to the extent of a State determination, as in *Richfield* and here, that the tax is an excise for the privilege of conducting a retail business and not a tax laid on the consumer, nonetheless

the State construction is not determinative of the question of whether the tax violates a Federal right, that issue turning not on the characterization which the State gives the tax but on its operation and effect. This is in no sense inconsistent with the noted holding in *Bismarck*, expressly reaffirmed in *Richfield*, that the determination of the State court as to the incidence of the tax is controlling so long as it is recognized, as we do, that it remains open for Federal determination whether, with the incidence of the tax being where the State court holds it to be, the passing of its economic burden to another violates the latter's Federal rights. It is noteworthy that in both *Carpenter* and *Richfield* the legal incidence of the tax in question, not merely its economic burden, fell on the parties whose Federal rights were asserted to have been violated thereby. *Carpenter* and *Richfield* are not determinative, therefore, of the question of whether plaintiff's immunity and exemption extends to the passing of the economic burden to it by the retailer who bears the legal incidence of the tax. In *Bedford, Bismarck* and *Roane-Anderson* the State taxing acts involved required, as distinguished from the Michigan act, that the retailer or party liable to the State for the tax collect the same from the consumer; hence, in those cases the legal incidence of the tax, as well as its economic burden, fell, in each instance, upon a consumer who enjoyed an express exemption from State taxation by act of congress. In consequence, these cases are not determinative of the question of plaintiff's immunity to or exemption from the economic burden of the Michigan sales tax. Much less are any of these five cases cited by plaintiff decisive of the extent of the obligation of the retailers in question here to pay to defendant an annual tax for the privilege of engaging in the retail business.

Defendant, in turn, urges as controlling the following: *James* v. *Dravo Contracting Co.*, 302 US 134 (58 S Ct 208,

82 L ed 155, 114 ALR 318); *Alabama* v. *King & Boozer*, 314 US 1 (62 S Ct 43, 86 L ed 3, 140 ALR 615); *Curry* v. *U.S.*, 314 US 14 (62 S Ct 48, 86 L ed 9); *Penn Dairies, Inc.*, v. *Milk Control Commission*, 318 US 261 (63 S Ct 617, 87 L ed 748); *Esso Standard Oil Co.* v. *Evans*, 345 US 495 (73 S Ct 800, 97 L ed 1174). In each of those cases an independent contractor who was not an agent or instrumentality of the United States engaged in the performance of United States contracts. State taxes or regulations imposed on the contractors in conection with such performance were held valid despite the fact that the economic burden thereof was passed on by the contractors to the United States. Plaintiff, in disputing the applicability of those cases here, points out that in each the United States or its instrumentality was insulated from the direct impact of the State tax or regulation by the intervention of an independent contractor; that the tax or regulation burdened the government or its instrumentality only to the extent that it chose to assume that burden, by contract, from the contractor directly taxed or burdened; that in each the tax was collected from a contractor while here the retailer collects it from the plaintiff itself; that in those cases the question went to whether contractors performing government contracts were immune or exempt, but that here the question pertains to the nature and extent of the immunity and congressionally conferred exemption of plaintiff itself as an instrumentality of the United States. Plaintiff urges that the holdings in those cases mean simply that, inasmuch as the contractors were not granted express exemptions by act of congress, the mere fact that the economic burden ultimately came to rest on the United States did not afford a sufficient basis for implying an immunity in the contractors. We think, however, that those cases are analogous in that the legal incidence fell on the contractors, because the tax was required to be collected from them as purchasers, and they

passed its burden on the United States and here, similarly, the legal incidence falls upon the retailer, he alone is required by law to pay the tax, and he passes on the burden to plaintiff. Here, as there, the burden on plaintiff is only such as it chooses to assume in doing business with retailers. The State collects no tax from plaintiff and the latter is required to pay no tax to the State. Whether the person upon whom the legal incidence of the State tax or regulation falls, and who passes along its economic burden to a Federal instrumentality, happens to be the purchasing independent contractor, as in the cited cases, or the selling retailer, as here, seems to us a distinction without a difference so far as legal significance is concerned. We think the cited cases are authority for the proposition that the passing on of the economic burden to a Federal instrumentality is not violative of the latter's constitutional immunity or statutory exemption when worded as here. Decision in *King & Boozer,* holding valid a State sales tax imposed on purchases by a contractor for use in performance of a United States contract, was definitely predicated on an express finding that, despite its economic burden on the United States, the legal incidence of the tax was not on the United States but on the contractor. That that was the controlling factor in that cases was indicated in so many words in the majority opinion in *Kern-Limerick, Inc.,* v. *Scurlock,* 347 US 110 (74 S Ct 403, 98 L ed 313). Similarly, in *Esso,* in the course of distinguishing that case from *U.S.* v. *Allegheny County,* 322 US 174 (64 S Ct 908, 88 L ed 1209), the reasoning of the court seems to boil down to that same concept, that it is the legal incidence and not the economic burden of a State tax to which the immunity or statutory exemption of a Federal instrumentality extends and that exemption of the intermediate person upon whom the legal incidence of the tax falls is not to be implied, regardless of the fact that he passes its burden on to the United States, so long as

congress has not expressly exempted such person therefrom.

We now consider reasoning, set forth by the writer of one of the briefs in a companion case, to the effect that *Dravo, King & Boozer,* and *Penn Dairies* are not controlling in the circumstances at bar because they involve only implied immunity and not, as in the case of plaintiff here, both such immunity and express statutory exemption. It is emphasized that the Federal cases make a distinction between those two situations and suggested that they hold, in substance, that implied immunity is to be narrowly construed and is a limited one attaching only to the attemped imposition of the legal incidence of a State tax or regulation on the United States or its instrumentalities, but that, on the other hand, as stated in *Dravo,* "Semble that congress has power to prevent interference with the operations of the Government through State taxation laid on receipts of those who render it services under contracts." (Syllabus 13), citing *Thomson* v. *Pacific Railroad Co.,* § 9 Wall (76 US) 579 (19 L ed 792). With that proposition and asserted distinction the State has no quarrel whenever the act of congress clearly exempts the transaction in question in plain and unmistakable terms. The fact remains, however, that the person upon whom the tax is imposed here, namely, the retailer, is no more granted an express exemption by act of congress than were the contractors upon whom a tax or regulation was imposed in *Dravo, King & Boozer,* and *Penn Dairies.* It may be said as appropriately here as it was in the opinion in *Dravo* that while it may well be competent for congress to enact legislation to effect the result here contended for by plaintiff, namely the exemption of the intermediate party upon whom the legal incidence of the tax falls, it has not done so. The act of congress grants plaintiff an express statutory exemption from certain State taxation but the State does not levy upon or collect a

tax from plaintiff. The State sales tax statute operates on retailers in Michigan. They alone are obligated to pay the tax. The purchasers are under no such obligation except as they assume, by contract or purchase, to shoulder the economic burden. In *Esso* the Defense Supplies Corporation, wholly owned by the Reconstruction Finance Corporation, was specifically exempted by act of congress from the State storage and use tax there involved. Its aviation fuel was stored, for a consideration, in Esso's tanks by a contractual arrangement under which the United States government agreed to assume all of Esso's liability for State taxes in connection therewith. It was held that the Defense Supplies Corporation's express statutory exemption did not operate to exempt Esso from the State tax on that storage operation even though its economic burden was, by contract, passed on to the United States, the court saying: "There is no claim of a stated immunity. And we find none implied." That is to say, the express statutory exemption of Defense Supplies Corporation applies only to a State tax whose legal incidence falls upon that instrumentality, but does not constitute a stated immunity against what was involved in that case, namely, a State tax whose legal incidence falls upon a contractor who passes its economic burden, by contract, to that Federal instrumentality. The reasoning in *Esso* impels to the conclusion that plaintiff's express statutory exemption does not serve to exempt Michigan retailers in relation to sales made to plaintiff for the reason that congress has not undertaken to so provide. The reading into the Federal reserve act of such an exemption with respect to the retailers would amount to an exemption by implication as certainly as it would in *Dravo, King & Boozer,* and *Penn Dairies,* were the involved State tax or regulation to be held inapplicable there.

Plaintiff discounts any distinction between *Bismarck* and the instant case, urging that the requirement of the

North Dakota statute that the retailer collect the tax from the purchaser, thus imposing the legal incidence of the tax on the latter, is approximated by the provisions of section 23 of the Michigan act, which permits the retailer to add the tax to his sales price and prohibits him from holding out that it is not considered an element in the price to the consumer. It is suggested that, as a practical matter, the only difference between the two statutes is one of "nice language" but that the effect is the same and, in consequence, the decision in both should be the same. Language is, of course, the substance of which statutes, contracts and a myriad of legal relationships are made. We do not think the mentioned difference in statutory language so fine spun or negligible as to preclude a difference in results. It is manifest that "nice langauge," employed not in the applicable statutes but in the contracts involved, afforded the sole basis for the difference in results between *King & Boozer* and *Kern-Limerick*. In the latter a majority of the supreme court of the United States held that the immunity of the United States government from a State sales tax extended to purchases by a contractor used in the performance of a United States contract while in *King & Boozer* the opposite was held. In both cases the legal incidence of the tax under the governing State law fell on the purchasing contractor and in both the latter passed its economic burden on to the United States government. While a dissenting minority in *Kern-Limerick* held to the view that the majority opinion therein overruled *King & Boozer*, the majority opinion distinguished the two cases on the sole ground that in *Kern-Limerick* the agreement between the United States and the contractor made the latter a purchasing agent of the government, while in *King & Boozer* an almost comparable contract did not so provide. In consequence, the majority in *Kern-Limerick* found that the United States was, under the terms of the contract with the contractor, the purchaser and

for that reason held that the tax could not be collected under a statute which made the purchaser liable for the tax, and in so concluding said (p 122):

> "Thus, *King & Boozer* is not controlling for, though the government also bore the economic burden of the State tax in that case, the legal incidence of that tax was held to fall on the independent contractor and not upon the United States."

That establishes the "legal incidence" of a tax as the decisive factor. The difference between contractual provisions in *King & Boozer*, on the one hand, and *Kern-Limerick*, on the other, is no more significant or impelling to opposite results than is the difference between the provisions of the North Dakota and the Michigan sales tax acts. The North Dakota act imposes the legal incidence on the purchaser while the Michigan act imposes it on the retailer, a distinction which the Federal cases hold controlling.

Decree upholding the right of defendant to require Michigan retailers to include in their gross proceeds used for the computation of their annual sales tax any proceeds derived from sales to plaintiff and to collect such tax from them in accord therewith is hereby affirmed, with costs to defendant.

BUTZEL, C. J., and CARR, BUSHNELL, SHARPE, BOYLES, REID, and KELLY, JJ., concurred.

APPENDIX G

MICHIGAN SALES TAX ACT

(Act 167, Michigan Public Acts of 1933, as amended; C. L. 1948, Section 205.51, *et seq;* amendments subsequent to those made by Act 272 of the Public Acts of 1949 are not germane to the issues involved here and have not been included.)

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

SECTION 1. That when used in this act:

(a) The term "person" includes any individual, firm, copartnership, joint venture, association, social club, fraternal organization, municipal or private corporation whether organized for profit or not, company, estate, trust, receiver, trustee, syndicate, *the United States,*[1] state of Michigan, county, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

(b) The term "sale at retail" means any transaction by which is transferred for consideration any of the incidents of the ownership of tangible personal property, when such transfer is made in the ordinary course of the tranferor's business and is made to the transferee for consumption or use, or for any other purpose than for resale in the form of tangible personal property to a person licensed under this act.

(c) The term "sale at retail" shall also include the sale of tangible personal property to persons engaged in the business of constructing, altering, repairing or improving real estate for others except in the fulfillment of a contract with any of the exempt classifications hereinafter set forth

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[1] The italicized matter was added by Act 272, P.A. 1949.

in section 4 and subsections (a) and (b) of section 4a of this act.

(d) The term "sale at retail" includes conditional sales, installment lease sales and any other transfer of such property when title is retained as security for the purchase price but is intended to be transferred later.

(e) The term "sale at retail" includes sales of electricity, natural and/or artificial gas and steam when made to the consumer or user for consumption or use rather than for resale: Provided, however, That the term "sale at retail" shall not include the sale of water through water mains.

(f) The provisions of subsection (b) of section 1 of this act, as amended, shall be construed as declaratory of the intension of the legislature in the enactment of Act. No. 167 of the Public Acts of 1933, and the state board of tax administration shall not collect or receive any tax upon the gross proceeds of any sales not taxable under this act as amended.

(g) The term "sale at retail" shall not include an isolated transaction by a person not licensed or required to be licensed under this act, in which any tangible personal property is offered for sale, sold, transferred, and delivered by the owner thereof.

(h) The term "gross proceeds" means the amount received in money, credits, property or other money's worth in consideration of sales at retail within this state, without any deduction on account of the cost of the property sold, the cost of materials used, the cost of labor or services purchased, amounts paid for interest or discounts, or any other expenses whatsoever, nor shall any deduction be allowed for losses. Credits or refunds for returned goods may be deducted.

(i) The term "business" includes all activities engaged in by any person or caused to be engaged in by him with

the object of gain, benefit or advantage, either direct or indirect.

(j) The term "tax year" or "taxable year" means the fiscal year of the state of Michigan or the taxpayer's fiscal year when permission is obtained by him from the department to use his fiscal year as the tax period in lieu thereof.

(k) The word "department" means the department of revenue of the state of Michigan.

(l) The word "taxpayer" means any person subject to any tax hereunder.

(m) The word "tax" shall include all taxes, interest or penalties levied under this act.

(n) When it shall be determined by the department that it is necessary for the efficient administration of this act to regard any unlicensed person such as salesmen, representatives, peddlers or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, or employers, the department may so regard them and may regard the dealers, distributors, supervisors or employers as making sales at retail at the retail price for the purposes of this act.

SECTION 2. There is hereby levied upon and there shall be collected from all persons engaged in the business of making sales at retail, as hereinbefore defined, an annual tax for the privilege of engaging in such business equal to 3 per cent of the gross proceeds thereof, plus the penalty and interest when applicable as hereinafter provided, less deductions allowed in sections 4 and 4a.

Any person engaged in the business of making sales at retail who is at the same time engaged in some other kind of business, occupation, or profession not taxable under

this act, shall keep books to show separately the transactions used in determining the tax herein levied. In the event of such person failing to keep such separate books, there shall be levied upon him the tax hereinbefore mentioned equal to 3 per cent of the entire gross proceeds of both or all of his businesses. The taxes levied hereunder shall be a personal obligation of the taxpayer.

The tax hereby imposed shall be payable from and after June 30, 1933.

SECTION 3. If any person after the thirtieth day of June, 1933, shall engage or continue in any business for which a privilege tax is imposed by this act, he shall under such rules and regulations as the department shall prescribe, apply for and obtain from the department, upon the payment of a registration fee of $1.00, a license to engage in and to conduct such business for the current tax year; if said applicant taxpayer shall have at any time failed, refused, or neglected to pay any tax or interest or penlty upon any tax, or shall have attempted to evade the payment of any tax or interest or penalty upon any tax by means of petition in bankruptcy, or if applicant taxpayer shall be a corporation and the department shall have reasons to believe that the management or control of said corporation is under any person or persons who shall have failed to pay any tax or interest or penalty upon any tax within the purview of this section as above set forth, then it shall be the duty of the department to require a surety bond payable to the state of Michigan, upon which said applicant taxpayer shall be the obligor, in a sum of not less than $1,000.00 nor more than $25,000.00, conditioned that the applicant taxpayer shall comply with the provisions of this act and will promptly file true reports and pay the taxes, interest and penalties provided for or required by this act, which bond shall be approved as to the amount and surety by the department: Provided,

That said applicant taxpayer may in lieu of said surety bond deposit a sum of money with said department in such amount as the department shall determine, to guarantee the payment of the tax, interest and penalty and compliance with this act, but the amount so determined by the department shall not exceed the estimated tax payable during a one year period; and he shall thereby be duly licensed to engage in and conduct such business. The department may require said applicant taxpayer to furnish such other and further bond as it shall deem necessary, from time to time, within the limits in this section hereinbefore set forth, on the giving of 30 days' notice in writing. Said license shall expire on the last day of the tax year next succeeding the date of its issuance and shall be renewed annually upon the condition that he shall pay the aforesaid registration fee and the tax accrued to the state under the provisions of this act. No person shall engage or continue in any business taxable hereunder without securing a license: Provided, however, That no person, firm, or corporation engaged solely in industrial processing or agricultural producing under this act and who makes no sales at retail within the meaning of this act shall be required to have a license.

SECTION 4.[2] In coputing the amount of tax levied under the provisions of this act for any month, the taxpayer may

[2] Prior to amendment by Act 272 of the Public Acts of 1949, Section 4 read as follows:

4 (a) In computing the amount of tax levied under the provisions of this act, for any month, the taxpayer may deduct from the gross proceeds taxable under this act, the sum of $50.00. Every person exercising any privilege taxable hereunder for any fractional part of a month shall be entitled to a deduction of that part of the sum of $50.00 which bears the same proportion to the total sum that the period of time during which such person is engaged in such business bears to a whole month. (b) No person subject to a tax under this act need include in the amount of his gross proceeds used for the computation of the tax any proceeds of his business derived from sales to the United States, the state of Michigan, its departments or institutions, or any of its subdivisions, or any proceeds of his business which are exempt from taxation by reason of the provisions of the constitution of the United States or the constitution of Michigan, and as a consumer, the United States, the state of Michigan, its departments or institutions, or any of its subdivisions for their own consumption, shall not be liable for the payment of the tax.

deduct from the gross proceeds taxable under this act, the sum of $50.00. Every person exercising any privilege taxable hereunder for any fractional part of a month shall be entitled to a deduction of that part of the sum of $50.00 which bears the same proportion to the total sum that the period of time during which such person is engaged in such business bears to the whole month.

No person subject to a tax under this act need include in the amount of his gross proceeds used for the computation of the tax any proceeds of his business derived from sales to the United States, its unincorporated agencies and instrumentalities, any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States, the American Red Cross and its chapters and branches, and the state of Michigan or its departments and institutions or any of its political subdivisions.

SECTION 4a. No person subject to tax under this act need include in the amount of his gross proceeds used for the computation of the tax any sales of tangible personal property:

(a) Not for resale, and when not operated for profit, to schools or other educational institutions, hospitals and homes for the care and maintenance of children or aged persons: Provided, however, That the term "not operated for profit" as used in this section shall mean when operated by an entity of government, a regularly organized church, religious or fraternal organization, and when the income from the operation does not inure, in whole or in part, to the benefit of any individuals or private shareholders, directly or indirectly, or to a home for children operated by a veterans' organization.

(b) Not for resale to regularly organized churches or houses of religious worship, excepting such sales in activities as are mainly commercial enterprises.

(c) To bona fide enrolled students of school books and food by schools or other educational institutions not operated for profit.

(d) Not for resale to persons of catalogs, sales price lists, sales pamphlets or hand bills, commonly known as commercial advertising, when produced upon special order of the purchaser.

(e) To persons of vessels designed for commercial use of registered tonnage of 500 tons or more, when produced upon special order of the purchaser, and bunker and galley fuel, provisions, supplies, maintenance and repairs for the exclusive use of such vessels engaged in interstate commerce.

(f) To persons engaged in or having an interest in, as a business enterprise, and using or consuming said tangible personal property in the tilling, planting, caring for and/or harvesting of the things of the soil, in the breeding, raising or caring for livestock and/or poultry or horticultural products, including transfers of livestock and/or poultry or horticultural products for further growth: Provided, That in all such cases, at the time of the transfer of the tangible personal property, the transferee shall sign a statement, in a form approved by the department of revenue, stating that such property is to be used or consumed in connection with the production of horticultural or agricultural products as a business enterprise. Such statement shall be accepted by all courts as prima facie evidence of the exemption: Provided further, That this exemption shall not be construed to include transfers of food, fuel, clothing or any similar tangible personal property for personal living or human consumption: Provided further, That this exemption shall not be deemed to include tangible personal property permanently affixed and becoming a structural part of real estate.

(g) To persons for use or consumption in industrial

processing: Provided, That the term "industrial processing" shall not be deemed to include tangible personal property permanently affixed and becoming a structural part of real estate.

SECTION 5. The tax imposed by this act shall be in addition to all other license fees and taxes levied by law as a condition precedent to engaging or continuing in any business taxable hereunder, except as in this act otherwise specifically provided.

SECTION 6. The taxpayer shall, unless otherwise provided by law, on or before the fifteenth day of each month, make out a return for the preceding month on a form prescribed by the department, showing the entire amount of all sales and gross proceeds of his business, the allowable deductions therefrom, and the amount of tax for which he is liable, and he shall transmit the return, together with a remittance for the amount of the tax, to the department, on or before the fifteenth day of the month. Such monthly return shall be signed by the taxpayer or his duly authorized agent, and if prepared for the taxpayer by any other person, the return shall so state, giving the name and address of such person and be signed by such person, and giving the name of his employer, if any.

SECTION 7. Each taxpayer shall annually file a return with the department of revenue, on a form prescribed by the department, which shall include a statement of gross receipts as shown by taxpayers' federal income tax return for the last calendar year, or, if the taxpayer files his federal income tax return on a fiscal year basis, then the true copy shall be for the last completed fiscal year of the taxpayer. If the total receipts of the business as reported in the federal income tax return do not agree with the gross sales reported to the department of revenue for the same period, the taxpayer shall attach to his annual return a schedule showing a reconciliation of the 2

amounts and the reasons for the difference: Provided, however, The foregoing portion of this section shall not be applicable to a corporation authorized as a corporation to do business in each of 2 or more states. As a part of such annual return, the taxpayer shall include an accurate statement of the cost of goods withdrawn from his merchandise inventory for personal use or consumption of the taxpayer, his family or employees, or used for payment or consideration in any contract or obligation of the taxpayer; also, the name and address of any certified public accountant, public accountant, accountant, bookkeeper or person engaged in any multiple bookeeping service other than regular full time employees of the taxpayer, who made any entries in the books or records of the taxpayer or assisted, directed, counselled, or advised in the making of any books, records, or tax returns in connection with the business covered by such annual return. The department of revenue may require such additional information, including the number of paid employees and members of the taxpayer's family working without compensation, as it deems would be helpful in determining the accuracy of the monthly returns filed in accordance with section 6 of this act. Said annual return shall be filed within 30 days of the date set for the filing of the taxpayer's federal income tax return, and shall be signed by the taxpayer and verified under oath. If such annual return is prepared for the taxpayer by any other person, the return shall so state, giving the name and address of such person and be signed by such person, and giving the name of his employer, if any.

SECTION 8. Any person engaging in 2 or more places in the same business or businesses taxable under this act, shall file a consolidated return covering all such business activities engaged in within this state and shall be entitled to deduct one exemption only in the amount of $50.00 per month as allowed in section 4. .

SECTION 9. As soon as practicable after each return is filed the department shall examine it. If it then appears that the correct amount of tax is greater or less than that shown in the return, the tax shall be recomputed and the correct tax determined. If the amount paid exceeds that which should have been paid on the basis of the tax so recomputed, the excess so paid may be credited without interest against a subsequent tax or such amount may be refunded if requested by the taxpayer.

If the amount paid is less than the amount which should have been paid, the deficiency, together with interest thereon at the rate of ½ of 1 per cent per month from the time the tax was due, shall become due and payable after notice and hearing as herein provided.

If any part of the deficiency is due to negligent or intentional disregard of this act or of authorized rules and regulations of the department, but without intent to defraud, there shall be added as a penalty 10 per cent of the total amount of the deficiency in the tax, and interest shall be collected at the rate of 1 per cent per month on the amount of such deficiency in the tax from the time it was due, which interest and penalty shall become due and payable after notice and hearing as hereinafter provided.

If any part of the deficiency is due to a fraudulent intent to evade the tax, then there shall be added as a penalty 100 per cent of such deficiency and, in such a case, the whole amount of tax unpaid, together with the penalty, shall become due and payable after notice and hearing as hereinafter provided, and an additional 1 per cent per month on the tax shall be added from the date such tax was due until paid.

Penalties and interest as provided herein for fraudulent intent to evade the tax shall not be waived by the department.

Whenever notice is required under the provisions of this act, such notice shall be given either by personal service or by registered mail addressed to the last known or licensed address of the taxpayer.

No deficiency, interest or penalty shall be assessed for any year after the expiration of 6 years from the thirtieth day of June for such year, nor shall the taxpayer claim refund of any amount paid by him to the department after the expiration of 3 years from the date of payment thereof: Provided, however, That a person not licensed shall be held liable for all taxes due for the entire period in which he has made sales at retail: Provided further, That no taxpayer shall assign his claim against the state to any other person: Provided further, That if any person subject to tax under this act shall fraudulently conceal any liability for the tax or any part thereof, the department shall, upon discovery of such fraud and within 2 years thereafter, proceed to assess such tax with penalties and interest as hereinbefore provided, computed from the date on which such tax liability originally accrued and such tax, penalties and interest shall become due and payable after notice and hearing as hereinafter provided, anything herein contained to the contrary notwithstanding.

SECTION 10. All remittances of taxes imposed by this act shall be made to the department by bank draft, check, cashier's check, money order, certificate of deposit or money. The department shall issue its receipt, and shall forthwith deposit all moneys received in the state treasury where it shall be credited as in this act provided: Provided, That no remittance other than cash shall be a final discharge of liability for the tax herein assessed and levied unless and until it has been paid in cash.

SECTION 11. If any person fails or refuses to file a return within the time specified in this act, the department shall proceed as soon as possible to assess the tax against such person and shall notify him of the amount thereof

together with a $2.00 penalty or 25 per cent of the tax, whichever amount is greater.

In case of failure or refusal to file a remittance with any return required by this act, within the time prescribed by this act or prescribed by the department in pursuance of the provisions of this act, 10 per cent of the tax shall be added as a penalty: Provided, That when a return or remittance is filed after such time and it is shown that the failure to file it was due to reasonable cause and not due to wilful neglect, no such addition shall be made to the tax. The amount so added shall be collected as a part of the tax: Provided further, however, That the department shall at no time have the power or authority to cancel or diminish any part of the tax imposed under the provisions of Act No. 167 of the Public Acts of 1933, with the exception of the penalties provided for in this section.

SECTION 12. If the tax imposed by this act is not paid within the time allowed by section 6 of this act or as otherwise required by law, the department, or some person designated by it, may cause a demand to be made on the taxpayer for the payment thereof. If such tax remains unpaid for 10 days after such demand has been made and no proceedings have been taken to review the same, the department may issue a warrant under the official seal of its office, directed to the sheriff of any county of the state or to any state officer authorized to serve process, commanding said sheriff or other officer to levy upon and sell the real and personal property of the taxpayer, without exemption, found within his jurisdiction, for the payment of the amount thereof with the added penalties, interest and the cost of executing the warrant. Such warrant shall be returned to the department together with the money collected by virtue thereof within the time therein specified, which shall not be less than 20 nor more than 90 days from the date of the warrant. The sheriff or other officer to

whom such warrant shall be directed shall proceed upon the same in all respects and with like effect and in the same manner as prescribed by law in respect to executions issued against property upon judgments by a court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner. The state of Michigan, through the department or some officer or agent designated by it, is hereby authorized to bid for and purchase any property sold under the provisions hereof.

In addition to the mode of collection provided herein, the department may bring an action at law in the county in which the business or any part thereof is carried on, to collect and recover the amount of taxes, interest and penalties claimed to be due from any taxpayer.

SECTION 13. The tax herein imposed in addition to the interest and penalties provided in sections 9 and 11 hereof, and costs that may accrue in addition thereto, shall be a lien in favor of the state against all property and rights of property, both real and personal, then owned or afterwards acquired by any person or persons, firm, association or corporation, liable therefor, to secure the payment of such tax, interest, penalties and costs, which lien shall attach to the property from and after the date that any report upon which the specific tax is computed is required by this act to be filed. Such lien shall take precedence over all other liens and incumbrances whatsoever, irrespective of character or date.

If any person liable for a tax levied hereunder shall sell out his business or stock of goods or shall quit the business, such person shall make a final return within 15 days after the date of selling or quitting business. His successor or succeeding successors, if any, shall be required to withhold sufficient of the purchase money to cover the amount of such taxes and interest and penalties as may be due

and unpaid until such time as the former owner shall produce a receipt from the department showing that they have been paid, or a certificate stating that no taxes are due. If the purchaser or succeeding purchasers of a business or stock of goods shall fail to withhold purchase money as above provided, he or they shall be personally liable for the payment of the taxes, interest and penalties accrued and unpaid on account of the operation of the business by the former owner.

SECTION 14. If the department finds that a person liable for tax under any provisions of this act designs quickly to depart from the state or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect such tax unless such proceedings be brought without delay, the department shall cause notice of such finding to be given such person, together with a demand for an immediate return and immediate payment of such tax. Warrant may issue immediately upon issuance of such jeopardy assessments. Thereupon such tax shall become immediately due and payable. If such person (1) is not in default in making any return or paying any tax prescribed by this act, and (2) furnishes evidence satisfactory to the department under regulations prescribed by the department, that he will duly return and pay the tax to which the department's finding relates, then such tax shall not be payable prior to the time otherwise fixed for payment.

SECTION 15. The corporation and securities commission shall withhold the issuance of any certificate of dissolution or withdrawal in the case of any corporation organized under the laws of this state or organized under the laws of another state and admitted to do business in this state until the receipt of a notice from the department to the effect that all taxes levied under this act against

any such corporation have been paid, or until it shall be notified by the department that the applicant is not indebted for any taxes levied hereunder.

SECTION 16. Any person against whom a tax shall be assessed as herein provided may be restrained and enjoined by proper proceedings instituted in the name of the state of Michigan, brought by the attorney general at the request of the department, from engaging and/or continuing in a business for which a privilege tax is required by the provisions of this act, until such tax shall have been paid, and/or license secured, and until such person shall have complied with the provisions of this act.

SECTION 16a. It shall be the duty of each assessing officer of each city, village or township in preparing the annual property tax roll of personal property to show on the assessment roll the sales tax license number of each person engaged in the business of making retail sales of tangible personal property subject to tax under this act. It shall be the duty of each said assessing officer to immediately report to the department of revenue the name and address and type of business of any person found in the business of making such retail sales and not licensed to do so as required by section 3 of this act.

Any city, village or township clerk, marketmaster, or any other state, county or municipal official whose duty it is to issue licenses or permits to engage in a business involving the sale at retail of tangible personal property subject to tax under this act shall, before issuing such license or permit, require proof that the person to whom such license or permit is to be issued is the holder of a sales tax license as required by section 3 of this act or has applied to the department of revenue for such license.

Any city, village, township or state officer who shall receive information which leads him to believe that a

person making retail sales subject to tax under this act is about to close his business or cease making retail sales shall immediately notify the department of revenue of this fact in order that the department may make such investigation as may be necessary to protect the interests of the state.

SECTION 17. Every person liable for any tax imposed under this act shall keep an accurate and complete beginning and annual inventory and purchase records of additions to inventory, complete daily sales records, receipts, invoices, bills of lading and any and all pertinent documents in such form as the department may require and wherever an exemption from sales tax is claimed by reason of the sale being for resale or for any of the other exemptions or deductions granted under this act, there shall be a record kept of the name and address of the person to whom the sale is made, the date of the sale, the article purchased, the use to be made of the article, the amount of the sale and if that person has a sales tax license, that number shall also be noted thereon. Any person knowingly making a sale of tangible personal property to another not licensed under this act, for the purpose of resale at retail, shall be liable for the tax imposed by this act under the provisions of this act. Such records must be kept for the 6 year period as stated in section 9 hereof. Whenever in the judgment of the department it is necessary, it may require any person, by notice served upon him, to make a return, render under oath such statements, or keep such records, as the department deems sufficient to show whether or not such person is liable to tax under this act. In the event the taxpayer fails to file a return or to maintain or preserve proper records as prescribed in this section or the department has reason to believe that any records maintained or returns filed are inaccurate or incomplete and that additional taxes are due, the depart-

ment shall be empowered to assess, upon such information as is available or may come into possession of the department, the amount of the tax due from the taxpayer. Such assessment after notice and hearing as hereinafter provided shall be deemed to be prima facie correct for the purpose of this act and the burden of proof of refuting such assessment shall be upon the taxpayer.

SECTION 18. The department may by itself, or its duly appointed agents, examine the books, records and papers of any person subject to taxation under this act. The commissioner or any deputy may issue a subpoena requiring any person to appear before the department or its duly designated and authorized agents and be examined with reference to any matter within the scope of the inquiry or investigation being conducted by the department and to produce any books, records or papers. The commissioner or any of his deputies, or any employee of the department authorized by the commissioner or any of his deputies, may administer an oath to a witness in any matter before the department. In case of disobedience of a subpoena, the department or any party to a proceeding before the department may invoke the aid of any circuit court of the state of Michigan in requiring the attendance and testimony of witnesses and the production of books, papers and documents. And any of the circuit courts of the state within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena, issue an order requiring such person to appear before said department and to produce books and papers if so ordered and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

SECTION 19. No person shall be excused from testifying or from producing any books, papers, records or memoranda in any investigation, or upon any hearing,

when ordered to do so by the department or its duly designated and authorized agents, upon the ground that the testimony or evidence, documentary or otherwise, may tend to incriminate him or subject him to a criminal penalty; but no person shall be prosecuted or subjected to any criminal penalty for, or on account of, such testimony or books, papers, records or memoranda which he produces upon such investigation or hearing. No person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

SECTION 20. The department shall publish annually a report containing its rulings and orders and it shall include such statistical information of a general character as it may deem of general interest. Unless in accordance with a judicial order, or as shall be required in the proper administration of this act, no member of the department, or agent or employee thereof, or former member, agent or employee, shall divulge any facts or information obtained in connection with the administration of this act: Provided, however, That all tax conferences or hearings concerning a notice of intent to assess, the assessment, or claims for the reduction thereof and any decision or determination thereon shall be open to the public.

SECTION 21. (Repealed by Pub. Acts 1941, No. 122, eff. Jan. 10, 1942.)

SECTION 22. If the department after examining the return of any taxpayer and based upon such examination and on any additional information subsequently acquired, determines that the taxpayer is indebted to the state by reason of deficiency of the remittance accompanying such return, the department shall give such taxpayer notice of the intention to levy such deficiency. Such taxpayer may, if he so desires and serves notice thereof upon the department within 20 days, demand a hearing on the question of the levy of such deficiency. Thereupon the department

shall set a time and place for public hearing and shall give the taxpayer reasonable notice thereof.

The taxpayer shall be entitled to appear before the department and be represented by counsel and present testimony and argument. After the hearing the department shall render its decision in writing and, by order, levy any deficiency found by it to be due and payable.

If any taxpayer is aggrieved by any decision of the department, he may appeal under the provisions of Act. No. 122 of the Public Acts of 1941, as amended, or he shall be required to pay the amount of taxes, interest and penalties found due by the department and shall be permitted to bring an action in the circuit court in the county in which the business for the privilege of doing which the tax is levied is carried on, to recover the amount of the taxes alleged to have been unlawfully levied upon him. Such action shall be commenced within 90 days after payment of such tax, penalties and interest so levied and shall be conducted in accordance with the statutes and rules of procedure concerning actions at law.

In the event any taxpayer is found entitled to recover any sums paid pursuant to the orders of the department as hereinbefore provided, such sums shall be paid from the general fund of the state on order of the department and warrant of the auditor general and deducted from current sales tax collections.

No injunction shall issue to stay proceedings for assessment or collection of any taxes levied under this act.

SECTION 23. No person engaged in the business of selling tangible personal property at retail shall advertise or hold out to the public in any manner, directly or indirectly, that the tax herein imposed is not considered as an element in the price to the consumer. Nothing contained in this act shall be deemed to prohibit any taxpayer from

reimbursing himself by adding to his sale price any tax levied hereunder: Provided, however, That no person other than the state may enrich himself or gain any benefit from the collection of payment of such tax.

SECTION 24. It shall be unlawful for any person to refuse to make the return required by this act; or to make, or to aid, abet or assist another in making, any false or fraudulent return or false statement in any return required by this act, with intent to defraud the state or to evade the payment of the tax, or any part thereof, imposed by this act; or for any person to aid, abet or assist another in any attempt to evade the payment of the tax, or any part thereof, imposed by this act; or for any person or the president, vice-president, secretary or treasurer of any company or association, to make or permit to be made for any person, company or association any false return, or any false statement in any return required in this act, with the intent to evade or assist in evading the payment of any tax hereunder. Any person violating any of the provisions of this act shall be guilty of a misdemeanor and, on conviction thereof, shall be fined not more than $1,000.00 or imprisoned not exceeding 1 year in the county jail or punished by both fine and imprisonment, at the discretion of the court for each and every violation of the act. In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent return, or any return containing any false or fraudulent statement, with the intent to defraud or to aid, abet or assist in defrauding the state, shall be guilty of the offense of perjury, and, on conviction thereof, shall be punished in the manner provided by law.

Any person who shall engage in any business in this state which is taxable under this act and who shall fail to secure from the department a license to engage in such business, as required in this act, or who shall continue to

engage in business after his license so to do shall have expired or have been suspended by the department, shall be guilty of a misdemeanor, the punishment for which shall be a fine of not more than $1,000.00 or imprisonment for not more than 1 year, or both such fined and imprisonment.

The department shall have power, after hearing, to suspend the license of any person who shall violate or fail to comply with any provisions of this act or any rule or regulation adopted by the department pursuant thereto. The department shall have power to restore licenses after suspension. If any person shall engage in business taxable under this act while his license is in suspension, the tax imposed with respect thereto shall nevertheless be imposed and be payable with respect to such business.

SECTION 25. All sums of money received and collected under the provisions of this act shall be deposited by the department in the state treasury to the credit of the general fund, to be disbursed only on an appropriation or appropriations by the legislature.

SECTION 26. (Repealed by Pub. Acts 1949, No. 272, which contained a section 3 making it effective on and after July 1, 1949.)

SECTION 27. (Repealed by Pub. Acts 1945, No. 267, imd. eff. May 25.)

SECTION 28. This act may be cited as the "General Sales Tax Act."

APPENDIX H

Section 5219

Revised Statutes of the United States
(12 U. S. C. Section 548)

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial coporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits:

Provided, however, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section.

APPENDIX I

PERTINENT PROVISIONS OF TENNESSEE RETAILERS SALES TAX ACT

(Chapter 3, Tennessee Public Acts 1947, as amended, Williams Tennessee Code Section 1328.22 *et seq.*)

SECTION 3. It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, or who rents or furnishes any of the things or services taxable under this act, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the State of Tennessee. For the exercise of said privilege, a tax is levied as follows:

(a) At the rate of two percent (2%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

(b) At the rate of two percent (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

(c) At the rate of two percent (2%) of the gross proceeds derived from the lease or rental of tangible personal property, as defined herein, where the lease or rental of such property is an established business, or part of an established business, or the same is incidental or germane to said business.

(d) At the rate of two percent (2%) of the monthly lease or rental price paid by lessee or rentee, or contracted or agreed to be paid by lessee or rentee, to the owner of the tangible personal property.

(e) The said tax shall be collected from the dealer as defined herein and paid at the time and in the manner as hereinafter provided.

(f) The tax so levied is and shall be in addition to all other taxes, whether levied in the form of excise, license, or privilege taxes, and shall be in addition to all other fees and taxes levied.

(g) Provided further, that where a manufacturer, producer, compounder or contractor erects or applies tangible personal property, which he has manufactured, produced, compounded or severed from the earth, for the account of or under contract with the owner of realty or other property, such person so using the tangible personal property shall pay the tax herein levied on the fair market value of such tangible personal property when used, without any deductions whatsoever.

SECTION 4. The aforesaid tax at the rate of two percent (2%) of the retail sales price, as of the moment of sale, or two percent (2%) of the cost price, as of the moment of purchase, as the case may be, shall be collectible from all persons as defined herein engaged as dealers, as hereinafter defined, in the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of tangible personal property.

The term "dealer" as used in this act shall include every person, as used in this act, who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state.

The term "dealer" is further defined to mean every person, as used in this act, who imports or causes to be imported, tangible personal property from any state or foreign country, for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state.

The term "dealer" is further defined to mean every person, as used in this act, who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use, or consumption, or distribution, or storage to be used or consumed in this state, tangible personal property as defined herein.

The term "dealer" is further defined to mean any person who has sold at retail, or used, or consumed, or distributed, or stored for use or consumption in this state, tangible personal property and who cannot prove that the tax levied by this act has been paid on the sale at retail, the use, the consumption, the distribution, or the storage of said tangible personal property.

The term "dealer" is further defined to mean any person, as used in this act, who leases or rents tangible personal property, as defined in this act, for a consideration, permitting the use or possession of said property without transferring title thereto.

The term "dealer" is further defined to mean any person, as used in this act, who is the lessee or rentee of tangible personal property, as defined in this act, and who pays to the owner of such property a consideration for the use or possession of such property without acquiring title thereto.

The term "dealer" is further defined to mean any person, as used in this act, who maintains or has within this state, directly or by a subsidiary, an office, distributing house, sales room, or house, warehouse, or other place of business.

Every "dealer" making sales, whether within or outside the state, of tangible personal property, for distribution, storage, use, or other consumption, in this state, shall at the time of making sales, collect the tax imposed by this act from the purchaser.

On all tangible personal property imported, or caused

to be imported from other states or foreign countries, and used by him, the "dealer" as thus defined, shall pay the tax imposed by this act on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state. For the purposes of this act, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event.

It is not the intention of this act to levy a tax upon articles of tangible personal property imported into this state or produced or manufactured in this state for export; nor is it the intention of this act to levy a tax on bona fide interstate commerce. It is, however, the intention of this act to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.

The provisions of this act shall not apply in respect to the use or consumption, or distribution, or storage of tangible personal property for use or consumption in this state upon which a like tax equal to or greater than the amount imposed by this act has been paid in another state, the proof of payment of such tax to be according to rules and regulations made by the commissioner. If the amount of tax paid in another state is not equal to or greater than the amount of tax imposed by this act, then the dealer shall pay to the commissioner an amount sufficient to make the tax paid in the other state and in this state equal to the amount imposed by this act.

It is further specifically provided that the "use tax"

shall not apply to tangible personal property owned or acquired in this state, or imported into this state, or held or stored in this state prior to the effective date of this act. But, the "use tax" will apply to all tangible personal property imported or caused to be imported into this state on or after the effective date of this act, unless said property has previously borne a sales or use tax in another state equal to or greater than the tax imposed by this act.

The taxes levied under this statute shall not apply to the use, sale, or distribution of religious publications to or by churches or other religious or charitable institutions for use in the customary religious or charitable activities.

SECTION 5. (a) The privilege tax herein levied, measured by retail sales shall be collected by the dealer from the purchaser or consumer.

(b) Dealers shall, as far as practicable, add the amounts of the tax imposed under this act to the sales prices or charge, which shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts. Any dealer who shall neglect, fail, or refuse to collect the tax herein provided, upon any, every, and all retail sales made by him, or his agents, or employees, or tangible personal property which is subject to the tax imposed by this act, shall be liable for and pay the tax himself.

(c) When the tax collected for any period is in excess of two percent (2%) the total tax collected must be paid over to the commissioner, less the compensation to be allowed the dealer as hereinafter set forth. This provision shall be construed with other provisions of this act and given effect so as to result in the payment to the commissioner of the total tax collected if in excess of two percent (2%).

(d) Any dealer who shall fail, neglect, or refuse to collect

the tax herein provided, either by himself or through his agents or employees, shall, in addition to the penalty of being liable for and paying the tax himself, be guilty of a misdemeanor, and open conviction shall be punished by a fine of not more than one hundred ($100.00) dollars or imprisonment in the county jail for not more than three months, or both, in the discretion of the court.

(e) A person engaged in any business taxable under this act shall not advertise or hold out to the public, in any manner, directly or indirectly, that he will absorb all or any part of the tax, or that he will relieve the purchaser of the payment of all or any part of the tax. A person who violates this provision with respect to advertising shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five ($25.00) dollars, nor more than two hundred fifty ($250.00) dollars, or imprisonment in the county jail for not exceeding three months, or both, in the discretion of the court. For a second or subsequent offense the penalty shall be double.

(f) The gross proceeds derived from the sale in this state of livestock, poultry, and other farm products direct from the farm are exempted from the tax levied by this act, provided that such sales are made directly by the producers. When sales of livestock, poultry, or other farm products are made to consumers by any person, as defined herein, other than producer, they are not exempted from the tax imposed by this act.

(g) It is specifically provided that the "use tax" as defined herein shall not apply to livestock and livestock products, to poultry and poultry products, to farm, and agricultural products, when produced by the farmer and used by him and members of his family.

(h) Provided, however, that each and every agricultural commodity sold by any person, other than a producer, to

any other person, who purchases not for direct consumption but for the purpose of acquiring raw products for use or for sale in the process of preparing, finishing, or manufacturing such agricultural commodity for the ultimate retail consumer trade shall be and is exempted from any and all provisions of this act, including payment of the tax applicable to the sale, storage, use, transfer, or any other utilization or handling thereof, except when such agricultural commodity is actually sold as a marketable or finished product to the ultimate consumer, and in no case shall more than one tax be exacted.

The term "agricultural commodity", for the purpose hereof, shall mean horticultural, poultry, and farm products, and livestock and livestock products.

FILED
APR 30 1955
HAROLD B. WILLEY, C

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 623

NATIONAL BANK OF DETROIT,
a national banking association,
Appellant

vs.

DEPARTMENT OF REVENUE
OF THE STATE OF MICHIGAN,
Appellee.

Statement of Appellee Opposing Jurisdiction and Motion to Dismiss or Affirm

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FRANKLIN DEKLEINE COMPANY, STATE PRINTERS
LANSING, MICHIGAN—1955

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 623

NATIONAL BANK OF DETROIT,
a national banking association,
Appellant

vs.

DEPARTMENT OF REVENUE
OF THE STATE OF MICHIGAN,
Appellee.

Statement of Appellee Opposing Jurisdiction

and

Motion to Dismiss or Affirm

Comes now appellee and files its statement in opposition to appellant's statement as to jurisdiction and hereby moves the Court to dismiss the appeal herein or affirm the decision and judgment of the Supreme Court of the State of Michigan, from which decision and judgment said appeal is taken.

I

Argument

Tax here is on the retailer and not on the bank and does not incapacitate appellant from discharging its duties to the government.

There is obviously nothing in the Michigan statute which tends to incapacitate a national bank from discharging its duties to the government or to impair its efficiency as an agency of the government. The amount of the tax is not unduly onerous and creates no financial burden; in fact the tax is not on the appellant at all.

National Banks are subject to laws of state and are governed in their daily course of business thereby, except where state law incapacitates banks from discharging duties to government,

McClelland vs. *Chipman*, 164 U. S. 347,

First National Bank of Commerce vs. *Commonwealth of Kentucky*, 9 Wall. [353] 362,

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Lewis v. *Fidelity & Deposit Co. of Maryland*, 292, U. S. 559, 556,

Rushton ex rel Banking Dept v. *Michigan National Bank*, 298 Mich 417,

Lau v. *Lau*, 304 Mich 218.

The former rule that state privilege taxes upon dealers in gasoline are invalid on the ground that the economic

burden would fall on the Federal Government, to whom the sales were directly made as determined in *Graves* vs. *Texas*, 298 U. S. 393; *Panhandle Oil Co.* vs. *Mississippi ex rel Knox*, 277 U. S. 218, is no longer tenable. *Alabama* vs. *King & Boozer*, 314 U. S. 1, 9.

Thus, a tax upon the gross receipts of an independent contractor rendering services to the Government does not substantially interfere with the performance of federal functions and is valid even though there may be a resulting increase in cost to the Government. *James* vs. *Dravo Contracting Co.*, 302 U. S. 134; *Cf. Metcalf & Eddy* vs. *Mitchell*, 269 U. S. 514 (federal income tax).

Taxes have been sustained on gasoline sold to an independent contractor working for the Government. *Trinity-farm Construction Co.* vs. *Grosjean*, 291 U. S. 466, and on a private corporation for the privilege of storing gasoline to which the Government had legal title. *Esso Standard Oil Co.* vs. *Evans*, 345 U. S. 495. But *Cf. United States* vs. *Allegheny County*, 322 U. S. 174 (tax on federal property itself).

Minimum price regulations affecting sales of milk to the United States are valid. *Penn Dairies, Inc.* vs. *Milk Control Commission*, 318 U. S. 261.

Sales and use taxes on materials furnished to independent contractors have been sustained even though the Government necessarily bore the economic incidence of the tax due to a "cost-plus" contract. *Curry* vs. *United States*, 314 U. S. 14 (use tax); *Alabama* vs. *King & Boozer*, 314 U. S. 1 (sales tax). However, immunity is available where the terms of the contract make the contractor a purchasing agent of the Federal Government, for then both the eco-

nomic and legal incidence of the tax fall on the Government. *Kern-Limerick Inc.* vs. *Scurlock*, 347 U. S. 110.

The operation and effect of a tax on a federal right is a matter to be decided by the Supreme Court. *See Carpenter* vs. *Shaw*, 280 U. S. 363, 367, a determination by the State respecting the legal incidence of the tax is binding on that Court. See *Federal Land Bank* vs. *Bismark Lumber Co.*, 314 U. S. 95, 99; *Colorado National Bank* vs. *Bedford*, 310 U. S. 41, 52.

And the Supreme Court of North Dakota upheld a privilege tax on sales to the Government where it was the legal obligation of the retailer and not the consumer to pay the tax. *Federal Land Bank* vs. *DeRochford*, 69 N. D. 382; 140 A. L. R. 625n, 637n.

Likewise the Supreme Court of California in *Western Lithograph Co.* vs. *State Board of Equalization*, 11 Cal2d 156, 117 A. L. R. 838, held that the tax on the retailer under the Retail Sales Tax Act of that state imposed on the basis of a return which includes receipts derived from sales of tangible personal property to a national bank, a federal instrumentality, does not unduly burden the federal government nor interfere with the exercise of the governmental function delegated to that instrumentality, and therefore was validly imposed.

While § 5219 of the Revised Statutes as last amended by 44 Stat 223, 12 U. S. C. A. § 548, supplies the basis for exemption of national banks from taxation, the tax should not be brought within the section by its indirect effect as the section is a restriction on the sovereign power to tax and therefore subject to the rule of strict construction.

II

The appeal herein is without merit, there being no substantial federal question involved.

Appellee contends that the record in this case discloses no substantial federal question and, therefore, this Court is without jurisdiction of this cause. It is therefore submitted that appellee's motion herein to dismiss the appeal or affirm the judgment of the Supreme Court of Michigan should be granted.

Wherefore appellee prays that this Court refuse to note jurisdiction in this cause and that appellee's motion to dismiss the appeal or affirm the judgment be granted.

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